

HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

REG-127270-06, page 534.

Proposed regulations under section 104 of the Code update the regulations to reflect statutory amendments limiting the section 104(a)(2) exclusion to damages for personal physical injuries or physical sickness and delete the “tort or tort-type rights” test.

EXCISE TAX

Rev. Rul. 2009-34, page 502.

Section 4221(e) reciprocal privileges. The list of countries that allow reciprocal privileges for purposes of the exemption for supplies for civil aircraft of foreign registry is updated and restated. Rev. Ruls. 74-346, 75-190, 75-398, and 75-526 superseded.

T.D. 9462, page 504.

REG-116614-08, page 536.

Final, temporary, and proposed regulations under section 7701 of the Code clarify that a single-owner eligible entity that is generally disregarded as an entity separate from its owner for any purpose, but regarded as a separate entity for certain excise tax purposes, is treated as a corporation for those excise tax purposes. The regulations also make conforming changes to the tax liability rule for disregarded entities and the treatment of entity rule for disregarded entities with respect to employment taxes. The regulations affect disregarded entities in general and, in particular, disregarded entities that pay or pay over certain federal excise taxes or that are required to be registered by the IRS.

ADMINISTRATIVE

T.D. 9462, page 504.

REG-116614-08, page 536.

Final, temporary, and proposed regulations under section 7701 of the Code clarify that a single-owner eligible entity that is generally disregarded as an entity separate from its owner for any purpose, but regarded as a separate entity for certain excise tax purposes, is treated as a corporation for those excise tax purposes. The regulations also make conforming changes to the tax liability rule for disregarded entities and the treatment of entity rule for disregarded entities with respect to employment taxes. The regulations affect disregarded entities in general and, in particular, disregarded entities that pay or pay over certain federal excise taxes or that are required to be registered by the IRS.

Rev. Proc. 2009-46, page 507.

This procedure contains revisions to Publication 1239, *Specifications for Filing Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips*, Electronically (revised 10-2009). Rev. Proc. 2008-34 superseded.

Rev. Proc. 2009-47, page 524.

Per diem allowances. This procedure provides optional rules for deeming substantiated the amount of certain business expenses of traveling away from home reimbursed to an employee or deductible by an employee or self-employed individual. Rev. Proc. 2008-59 superseded.

Announcement 2009-74, page 537.

This document contains corrections to both the August AFR (Rev. Rul. 2009-22) and the September AFR (Rev. Rul. 2009-29) which contained an inaccurate date in the Note in Table 4.

Announcements of Disbarments and Suspensions begin on page 537.
Finding Lists begin on page ii.



Department of the Treasury
Internal Revenue Service

The IRS Mission

Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying

the tax law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly and may be obtained from the Superintendent of Documents on a subscription basis. Bulletin contents are compiled semiannually into Cumulative Bulletins, which are sold on a single-copy basis.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations,

court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.

This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.

This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.

To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.

This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

The contents of this publication are not copyrighted and may be reprinted freely. A citation of the Internal Revenue Bulletin as the source would be appropriate.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Part I. Rulings and Decisions Under the Internal Revenue Code of 1986

Section 62.—Adjusted Gross Income Defined

26 CFR 1.62–2: *Reimbursements and other expense allowance arrangements.*

Rules are provided under which a reimbursement or other expense allowance arrangement for the cost of lodging, meal, and incidental expenses, or of meal and incidental expenses only, incurred by an employee while traveling away from home, satisfies the requirements of § 62(c) of the Code for substantiation of the amount of the expenses. See Rev. Proc. 2009-47, page 524.

Section 162.—Trade or Business Expenses

26 CFR 1.162–17: *Reporting and substantiation of certain business expenses of employees.*

Rules are provided for substantiating the amount of a deduction for an expense for meal and incidental expenses, or for incidental expenses only, incurred while traveling away from home. See Rev. Proc. 2009-47, page 524.

Section 4041.—Imposition of Tax

The list of countries that allow reciprocal privileges for purposes of the exemption for supplies for civil aircraft of foreign registry is updated and restated. See Rev. Rul. 2009-34, page 502.

Section 4081.—Imposition of Tax

The list of countries that allow reciprocal privileges for purposes of the exemption for supplies for civil aircraft of foreign registry is updated and restated. See Rev. Rul. 2009-34, page 502.

Section 4082.—Exemption for Diesel Fuel and Kerosene

The list of countries that allow reciprocal privileges for purposes of the exemption for supplies for civil aircraft of foreign registry is updated and restated. See Rev. Rul. 2009-34, page 502.

Section 4421.—Certain Tax-Free Sales

26 CFR 48.4421–4: *Tax-free sales of articles for use by the purchaser as supplies for vessels or aircraft.* (Also: 4041, 4081(a)(1), 4082(e), 6427(l)(4).)

Section 4221(e) reciprocal privileges. The list of countries that allow reciprocal privileges for purposes of the exemption for supplies for civil aircraft of foreign registry is updated and restated. Rev. Ruls. 74-346, 75-190, 75-398, and 75-526 superseded.

Rev. Rul. 2009–34

PURPOSE

This revenue ruling updates the list of countries that allow substantially reciprocal privileges for purposes of section 4221(e)(1) of the Internal Revenue Code (Code).

LAW

Section 4081 imposes a tax on certain removals, entries, and sales of taxable fuel, including kerosene. Section 4082(e) generally exempts from the § 4081 tax kerosene that is removed from any refinery or terminal directly into the fuel tank of an aircraft if such aircraft is employed in foreign trade or trade between the United States and any of its possessions. A similar exemption from the tax imposed by § 4041(c) on other liquids used in aviation is allowed by §§ 4041(d)(5) and (g)(1). The exemptions described above are derived from § 4221(d)(3).

Section 6427(l) sets forth the payment provisions that apply if previously taxed kerosene is used in an aircraft engaged in foreign trade or trade between the United States and any of its possessions.

Section 4221(d)(3) of the Code provides that the term “supplies for vessels or aircraft” means fuel supplies, ships’ stores, sea stores, or legitimate equipment

on vessels actually engaged in foreign trade or trade between the Atlantic and Pacific ports of the United States or between the United States and any of its possessions. For purposes of the preceding sentence, the term “vessels” includes civil aircraft employed in foreign trade or trade between the United States and any of its possessions.

Section 4221(e)(1) of the Code provides that, in the case of articles sold for use as supplies for aircraft, the privileges granted under § 4221(a)(3) in respect of civil aircraft employed in foreign trade or trade between the United States and any of its possessions, in respect of aircraft registered in a foreign country, shall be allowed only if the Secretary of the Treasury has been advised by the Secretary of Commerce that he has found that such foreign country allows, or will allow, substantially reciprocal privileges in respect of aircraft registered in the United States. If the Secretary of the Treasury is advised by the Secretary of Commerce that he has found that a foreign country has discontinued or will discontinue the allowance of such privileges, the privileges granted under § 4221(a)(3) shall not apply thereafter in respect of civil aircraft registered in that foreign country and employed in foreign trade or trade between the United States and any of its possessions.

NOTIFICATION

The Secretary of Commerce has advised the Secretary of Treasury that the current list of foreign countries that allow substantially reciprocal privileges in respect of aircraft registered in the United States is as follows:

| | |
|--|--------------------------------|
| Afghanistan | Lebanon |
| Albania | Liberia |
| Antigua and Barbuda | Luxembourg |
| Argentina | Macau |
| Aruba | Madagascar |
| Australia | Malaysia |
| Austria | Maldives |
| The Bahamas | Mali |
| Bahrain | Malta |
| Barbados | Marshall Islands |
| Belarus | Mexico |
| Belgium | Federated States of Micronesia |
| Belize | Moldova |
| Benin | Montenegro |
| Bermuda | Morocco |
| Bosnia and Herzegovina | Namibia |
| Brazil | Netherlands |
| Brunei Darussalam | Netherlands Antilles |
| Burkina Faso | New Zealand |
| Burma | Nicaragua |
| Cameroon | Nigeria |
| Canada | Norway |
| Cape Verde | Oman |
| Chad | Pakistan |
| Chile | Palau |
| People's Republic of China | Panama |
| Colombia | Paraguay |
| Democratic Republic of the Congo (only aircraft fuel and lubricants) | Peru |
| Cook Islands | Republic of the Philippines |
| Costa Rica | Poland |
| Cote d'Ivoire | Portugal |
| Cuba | Qatar |
| Czech Republic | Romania |
| Denmark | Russia |
| Dominica | Rwanda |
| Ecuador | St. Kitts and Nevis |
| Egypt (only aircraft fuel and lubricants) | St. Lucia |
| El Salvador | St. Vincent and the Grenadines |
| Ethiopia | Samoa |
| Fiji | Saudi Arabia |
| Finland | Serbia |
| France | Singapore |
| Gabon | Slovak Republic |
| The Gambia | South Africa |
| Federal Republic of Germany | Spain |
| Ghana | Sri Lanka |
| Greece | Suriname |
| Grenada | Sweden |
| Guatemala | Switzerland |
| Guyana | Taiwan |
| Haiti | Tajikistan |
| Honduras | Tanzania |
| Hong Kong | Thailand |
| Hungary | Tonga |
| Iceland | Trinidad and Tobago |
| India | Tunisia |
| Indonesia | Turkey |
| Iran | Turkmenistan |
| Ireland | Tuvalu |
| Israel | Uganda |
| Italy | Ukraine |

Jamaica
Japan
Jordan
Kazakhstan
Kenya (only aircraft fuel and lubricants)
Kiribati
Republic of Korea
Kuwait
Kyrgyzstan

United Arab Emirates
United Kingdom
Uruguay
Uzbekistan
Venezuela
Vietnam
Zambia
Zimbabwe

EFFECT ON OTHER REVENUE RULINGS

Rev. Rul. 74-346, 1974-2 C.B. 361, Rev. Rul. 75-190, 1975-1 C.B. 348, Rev. Rul. 75-398, 1975-2 C.B. 434, and Rev. Rul. 75-526, 1975-2 C.B. 435, are superseded.

DRAFTING INFORMATION

The principal author of this revenue ruling is Celia Gabrysh of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this revenue ruling, contact Celia Gabrysh at (202) 622-3130 (not a toll-free call).

Section 6427.—Fuels Not Used for Taxable Purposes

The list of countries that allow reciprocal privileges for purposes of the exemption for supplies for civil aircraft of foreign registry is updated and restated. See Rev. Rul. 2009-34, page 502.

Section 7701.—Definitions

26 CFR 301.7701-2: *Business entities; definitions.*

T.D. 9462

Department of the Treasury Internal Revenue Service 26 CFR Part 301

Disregarded Entities and Excise Taxes

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations clarifying that a single-owner eligible entity that is disregarded as an entity separate from its owner for any purpose, but regarded as a separate entity for certain excise tax purposes, is treated as a corporation for tax administration purposes related to those excise taxes. These regulations also make conforming changes to the tax liability rule for disregarded entities and the treatment of entity rule for disregarded entities with respect to employment taxes. These regulations affect disregarded entities in general and, in particular, disregarded entities that pay or pay over certain federal excise taxes or that are required to be registered by the IRS. The text of these temporary regulations serves as the text of proposed regulations (REG-116614-08) published in this issue of the Bulletin.

DATES: *Effective Date:* These regulations are effective on September 14, 2009.

Applicability Date: For dates of applicability, see §301.7701-2T(e)(2), (e)(5), and (e)(6).

FOR FURTHER INFORMATION CONTACT: Michael H. Beker, (202) 622-3070 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

This document contains amendments to the Procedure and Administration Regulations (26 CFR part 301) under section 7701 of the Internal Revenue Code (Code).

Under existing §301.7701-2(c)(2)(iv), a single-owner eligible entity that is disregarded as an entity separate from its owner for Federal tax purposes is treated as a separate entity for purposes of employment taxes imposed under Subtitle C of the Code

and related reporting requirements. The regulations treat these disregarded eligible entities as corporations for purposes of employment taxes imposed under Subtitle C of the Code and related reporting requirements.

Under existing §301.7701-2(c)(2)(v), a single-owner eligible entity that is disregarded as an entity separate from its owner for Federal tax purposes is treated as a separate entity for purposes of certain excise taxes reported on Form 720, “*Quarterly Federal Excise Tax Return*,” Form 730, “*Monthly Tax Return for Wagers*,” Form 2290, “*Heavy Highway Vehicle Use Tax Return*,” and Form 11-C, “*Occupation Tax and Registration Return for Wagering*,” excise tax refunds or payments claimed on Form 8849, “*Claim for Refund of Excise Taxes*,” and excise tax registrations on Form 637, “*Application for Registration (For Certain Excise Tax Activities)*.” Although liability for excise taxes is not dependent upon an entity’s classification, an entity’s classification is relevant for certain tax administration purposes, such as determining the proper location for filing a notice of federal tax lien and the place for hand-carrying a return under section 6091. Therefore, these temporary regulations clarify that these disregarded eligible entities are treated as corporations for tax administration purposes.

These temporary regulations also make conforming changes to the tax liability rule for disregarded entities in §301.7701-2(c)(2)(iii) and the treatment of entity rule for disregarded entities with respect to employment taxes in §301.7701-2(c)(2)(iv)(B).

Effective/Applicability Date

These regulations apply on and after September 14, 2009.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. For applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), please refer to the Special Analyses section of the preamble to the cross-reference notice of proposed rulemaking published elsewhere in this issue of the Bulletin. Pursuant to section 7805(f) of the Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Michael H. Beker, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

* * * * *

Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 301.7701-2 is amended by:

1. Revising paragraphs (c)(2)(iii) and (c)(2)(iv)(B).

2. Redesignating paragraph (c)(2)(v)(B) as paragraph (c)(2)(v)(C) and added new paragraph (c)(2)(v)(B).

3. In newly-designated paragraph (c)(2)(v)(C), *Example* (iv) is added.

4. Revising paragraph (e)(2).

The additions and revisions read as follows:

§301.7701-2 *Business entities; definitions.*

* * * * *

(c) * * *

(2) * * *

(iii) [Reserved]. For further guidance, see §301.7701-2T(c)(2)(iii).

(iv) * * *

(B) [Reserved]. For further guidance, see §301.7701-2T(c)(2)(iv)(B).

* * * * *

(v) * * *

(B) [Reserved]. For further guidance, see §301.7701-2T(c)(2)(v)(B).

(C) * * *

(iv) [Reserved]. For further guidance, see §301.7701-2T(c)(2)(v)(C) *Example* (iv).

* * * * *

(e) * * *

(2) [Reserved]. For further guidance, see §301.7701-2T(e)(2).

* * * * *

Par. 3. Section 301.7701-2T is added to read as follows:

§301.7701-2T *Business entities; definitions (temporary).*

(a) through (c)(2)(ii) [Reserved]. For further guidance, see §301.7701-2(a) through (c)(2)(ii).

(iii) *Tax liabilities of certain disregarded entities—(A) In general.* An entity that is disregarded as separate from its owner for any purpose under §301.7701-2 is treated as an entity separate from its owner for purposes of—

(1) Federal tax liabilities of the entity with respect to any taxable period for which the entity was not disregarded;

(2) Federal tax liabilities of any other entity for which the entity is liable; and

(3) Refunds or credits of Federal tax.

(B) *Examples.* The following examples illustrate the application of paragraph (c)(2)(iii)(A) of this section:

Example 1. In 2006, X, a domestic corporation that reports its taxes on a calendar year basis, merges into Z, a domestic LLC wholly owned by Y that is disregarded as an entity separate from Y, in a state law merger. X was not a member of a consolidated group at any time during its taxable year ending in December 2005. Under the applicable state law, Z is the successor to X and is liable for all of X's debts. In 2009, the Internal Revenue Service (IRS) seeks to extend the period of limitations on assessment for X's

2005 taxable year. Because Z is the successor to X and is liable for X's 2005 taxes that remain unpaid, Z is the proper party to sign the consent to extend the period of limitations.

Example 2. The facts are the same as in *Example 1*, except that in 2007, the IRS determines that X miscalculated and underreported its income tax liability for 2005. Because Z is the successor to X and is liable for X's 2005 taxes that remain unpaid, the deficiency may be assessed against Z and, in the event that Z fails to pay the liability after notice and demand, a general tax lien will arise against all of Z's property and rights to property.

(c)(2)(iv)(A) [Reserved]. For further guidance, see §301.7701-2(c)(2)(iv)(A).

(B) *Treatment of entity.* An entity that is disregarded as an entity separate from its owner for any purpose under §301.7701-2 is treated as a corporation with respect to taxes imposed under Subtitle C—Employment Taxes and Collection of Income Tax (Chapters 21, 22, 23, 23A, 24, and 25 of the Internal Revenue Code).

(C) through (c)(2)(v)(A) [Reserved]. For further guidance, see §301.7701-2(c)(2)(iv)(C) through (c)(2)(v)(A).

(B) *Treatment of entity.* An entity that is disregarded as an entity separate from its owner for any purpose under §301.7701-2 is treated as a corporation with respect to items described in §301.7701-2(c)(2)(v)(A).

(C) *Example.* (i) through (iii) [Reserved]. For further guidance, see §301.7701-2(c)(2)(v)(C) *Example* (i) through (iii).

(iv) Assume the same facts as in §301.7701-2(c)(2)(v)(C) *Example* (i) and (ii). If LLCB does not pay the tax on its sale of coal under chapter 32 of the Internal Revenue Code, any notice of lien the Internal Revenue Service files will be filed as if LLCB were a corporation.

(d) through (e)(1) [Reserved]. For further guidance, see §301.7701-2(d) through (e)(1).

(e)(2) Paragraph (c)(2)(iii) of this section applies on and after September 14, 2009. For rules that apply before September 14, 2009, see 26 CFR part 301 revised as of April 1, 2009.

(e)(3) through (e)(4) [Reserved]. For further guidance, see §301.7701-2(e)(3) through (e)(4).

(e)(5) Paragraph (c)(2)(iv)(B) of this section applies with respect to wages paid on or after September 14, 2009. For rules that apply before September 14, 2009, see

26 CFR part 301 revised as of April 1, 2009.

(e)(6) Paragraphs (c)(2)(v)(B) and (c)(2)(v)(C) *Example (iv)* of this section apply on and after September 14, 2009.

(7) [Reserved]. For further guidance, see §301.7701-2(e)(7).

(8) *Expiration Date.* The applicability of paragraphs (c)(2)(iii), (c)(2)(iv)(B),

(c)(2)(v)(B), (c)(2)(v)(C) *Example (iv)*, (e)(2), (e)(5) and (e)(6) of this section expires on or before September 11, 2012.

L. E. Stiff,
*Deputy Commissioner for
Services and Enforcement.*

Approved August 31, 2009.

Michael F. Mundace,
*Acting Assistant Secretary
of the Treasury (Tax Policy).*

(Filed by the Office of the Federal Register on September 10, 2009, 11:15 a.m., and published in the issue of the Federal Register for September 14, 2009, 74 F.R. 46903)

Part III. Administrative, Procedural, and Miscellaneous

IMPORTANT NOTES:

Electronic filing will be the **ONLY** acceptable method for filing Form 8027 at IRS/ECC-MTB. IRS/ECC-MTB offers an Internet connection at <http://fire.irs.gov> for electronic filing. The Filing Information Returns Electronically (FIRE) System will be down the week of December 22, 2009 through January 4, 2010 for upgrading. It is not operational during this time for submissions. *In addition, the FIRE System may be down every Wednesday 3:00 a.m. to 5:00 a.m. EST for maintenance.*

The Form 4419 is subject to review before the approval to transmit electronically is granted and may require additional documentation at the request of the IRS. If a determination is made concerning the validity of the documents transmitted electronically, IRS has the authority to revoke the Transmitter Control Code (TCC) and terminate the release of the files.

26 CFR 601.206: Tax forms and instructions.

Rev. Proc. 2009-46

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Part C. Filing Specifications and Record Layout

Part A. General

Sec. 1. Purpose

.01 Form 8027 is used by large food or beverage establishments when the employer is required to make annual reports to the IRS on receipts from food or beverage operations and tips reported by employees.

Note: All employees receiving \$20.00 or more a month in tips must report 100% of their tips to their employer.

.02 The Internal Revenue Service Enterprise Computing Center — Martinsburg (IRS/ECC-MTB) has the responsibility of processing Forms 8027 submitted electronically. The purpose of this revenue procedure is to provide the specifications for filing Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips, electronically. This revenue procedure is updated when legislative changes occur or reporting procedures are modified.

.03 This revenue procedure supersedes the following: Rev. Proc. 2008-34 published in Internal Revenue Bulletin 2008-27, dated July 7, 2008, Specifications for Filing Form 8027, Employer's Annual Information Return of Tip Income and Allocated Tips, Electronically. This revenue procedure is effective for Forms 8027 due the last day of February 2010 and any returns filed thereafter.

Sec. 2. Nature of Changes

There are no major changes to filing specifications for tax year 2009.

Please read the publication carefully and in its entirety before attempting to prepare your electronic file for submission.

Sec. 3. Where to File and How to Contact the IRS, Enterprise Computing Center — Martinsburg

.01 All correspondence concerning Forms 8027 processed at IRS/ECC-MTB should be sent to the following address:

IRS-Enterprise Computing Center — Martinsburg
Information Reporting Program
240 Murall Drive
Kearneysville WV 25430

.02 Requests for paper forms and publications should be requested by calling the "Forms Only Number" toll-free number **1-800-TAX-FORM (1-800-829-3676)**.

.03 Questions pertaining to electronic filing of Forms W-2 **must** be directed to the Social Security Administration (SSA). Filers can call 1-800-SSA-6270 to obtain the telephone number of the SSA Employer Services Liaison Officers for their area.

.04 A taxpayer or authorized representative may request a copy of a tax return or a Form W-2 filed with a return by submitting Form 4506, Request for Copy of Tax Return, to IRS. This form may be obtained by calling **1-800-TAX-FORM (1-800-829-3676)**.

.05 Electronic Products and Services Support, Information Reporting Branch, Customer Service Section (IRB/CSS), located at IRS/ECC-MTB, answers electronic, paper filing, and tax law questions from the payer community relating to the correct preparation and filing of business information returns (Forms 1096, 1098, 1099, 5498, 8027, and W-2G). IRB/CSS also answers questions relating to the electronic filing of Forms 1042-S and to the tax law criteria and paper filing instructions for Forms W-2 and W-3. Inquiries dealing with backup withholding and reasonable cause requirements due to missing and incorrect taxpayer identification numbers are also addressed by IRB/CSS. Assistance is available year-round to payers, transmitters, and employers nationwide, Monday through Friday, 8:30 a.m. to 4:30 p.m. Eastern Time, by calling toll-free **1-866-455-7438** or via e-mail at mccirp@irs.gov. **Do not include SSNs or EINs in e-mails or attachments since this is not a secure line.** The Telecommunications Device for the Deaf (TDD) toll number is **304-579-4827**. Call as soon as questions arise to avoid the busy filing seasons at the end of January and February. Recipients of information returns (payees) should continue to contact 1-800-829-1040 with any questions on how to report the information returns data on their tax returns.

.06 The telephone numbers and web addresses for questions about specifications for electronic submissions are:

Information Reporting Program Customer Service Section

TOLL-FREE 1-866-455-7438 or outside the U.S. 1-304-263-8700
e-mail at mccirp@irs.gov

304-579-4827 — TDD
(Telecommunication Device for the Deaf)

Fax Machine
Toll-free within the U.S. — 877-477-0572
Outside the U.S. — 304-579-4105

Electronic Filing — FIRE System
<http://fire.irs.gov>

TO OBTAIN FORMS:
1-800-TAX-FORM (1-800-829-3676)

www.irs.gov — IRS website access to forms

Sec. 4. Filing Requirements and Due Dates

.01 Section 6011(e)(2)(A) of the Internal Revenue Code requires that any person, including corporations, partnerships, individuals, estates, and trusts, required to file 250 or more information returns must file such returns electronically.

.02 The filing requirements apply separately to both original and corrected returns.

.03 The above requirements do not apply if you establish undue hardship (see Part A, Sec. 5).

.04 **DO NOT SUBMIT THE SAME INFORMATION ON PAPER FORMS THAT YOU SUBMIT ELECTRONICALLY, SINCE THIS WOULD RESULT IN DUPLICATE FILING.** This does not mean that corrected documents are not to be filed. If a return has been prepared and submitted improperly, you must file a corrected return as soon as possible. Refer to Part A, Sec. 10 for requirements and instructions for filing corrected returns.

.05 If an allocation of tips is based on a good faith agreement, a copy of this agreement must be submitted within 3 business days after receiving acknowledgement that IRS has accepted the electronically filed Form 8027. Fax to 859-669-5372 or mail a copy of this agreement to Internal Revenue Service, Attn: ICO ERS Stop 36101, 201 West Rivercenter Blvd., Covington, KY 41011. In your fax transmittal or cover letter, include the words “Form 8027 attachment(s)” and the following information: name of establishment, EIN (Employer Identification Number), establishment number, TCC and the tax year of the Form 8027.

.06 Employers can request a lower rate (but not lower than 2%) for tip allocation purposes by submitting an application to the IRS. See Sec. 31.6053-3(h)(4) of Employment Tax Regulations. Detailed instruction for requesting a lower rate can be found in the Instructions for Form 8027. The IRS will issue a determination letter to notify the employer when and for how long a reduced rate is effective. If a lower rate is used on the Form 8027 based on the IRS determination letter, a copy of this letter must be submitted within 3 business days after receiving acknowledgement that IRS has accepted the electronically filed Form 8027. Mail a copy of this letter to Internal Revenue Service, Attn: ICO ERS Stop 36101, 201 West Rivercenter Blvd., Covington, KY 41011. In your transmittal (e.g., fax transmittal or cover letter to 859-669-5372), include the words “Form 8027 attachment(s)” and the following information: name of establishment, establishment number, TCC and the tax year of the Form 8027.

.07 Electronic reporting to IRS for Form 8027 must be on a calendar year basis. The due date for paper reported Forms 8027 is the last day of February. However, Forms 8027 filed **electronically** are due March 31.

.08 If the due date falls on a Saturday, Sunday, or legal holiday, filing Form 8027 on the next day that is not a Saturday, Sunday, or legal holiday will be considered timely.

Sec. 5. Form 8508, Request for Waiver From Filing Information Returns Electronically

.01 If an employer is required to file electronically but fails to do so and does not have an approved waiver on record, the employer will be subject to a penalty of \$50 per return in excess of 250.

.02 If employers are required to file original or corrected returns electronically, but such filing would create a hardship, they may request a waiver from these filing requirements by submitting Form 8508, Request for Waiver From Filing Information Returns Electronically, to IRS/ECC-MTB. Form 8508 can be obtained on the IRS website at www.irs.gov or by calling toll-free 1-800-829-3676.

.03 Even though an employer may submit as many as 249 corrections on paper, IRS encourages electronic filing of corrections. Once the 250 threshold has been met, filers are required to submit any additional returns electronically. However, if a waiver for an original filing is approved, any corrections for the same type of returns will be covered under that waiver.

- .04 Generally, only the employer may sign the Form 8508. A transmitter may sign if given power of attorney; however, a letter signed by the employer stating this fact must be attached to the Form 8508.
- .05 A transmitter must submit a separate Form 8508 for each employer. Do not submit a list of employers.
- .06 All information requested on the Form 8508 must be provided to IRS for the request to be processed.
- .07 The waiver, if approved, will provide exemption from electronic filing for the current tax year only. Employers may not apply for a waiver for more than one tax year.
- .08 Form 8508 may be photocopied or computer-generated as long as it contains all the information requested on the original form.
- .09 Filers are encouraged to submit Form 8508 to IRS/ECC-MTB at least 45 days before the due date of the returns.
- .10 All requests for a waiver should be sent using the following address:

IRS-Enterprise Computing Center — Martinsburg
Information Reporting Program
Attn: Extension of Time Coordinator
240 Murall Drive
Kearneysville, WV 25430

.11 File Form 8508 for Forms W-2 with IRS/ECC-MTB, not SSA.

- .12 Waivers are evaluated on a case-by-case basis and are approved or denied based on criteria set forth under section 6011(e) of the Internal Revenue Code. The transmitter must allow a minimum of 30 days for IRS/ECC-MTB to respond to a waiver request.
- .13 If a waiver request is approved, the transmitter should keep the approval letter on file.
- .14 An approved waiver from filing Forms 8027 electronically does not provide exemption from all filing. The employer must timely file Form 8027 on acceptable paper forms with the Cincinnati Service Center. **The transmitter should also send a copy of the approved waiver to the Cincinnati Service Center where the paper returns are filed.**

Sec. 6. Form 4419, Application for Filing Information Returns Electronically

- .01 For the purposes of this revenue procedure, the EMPLOYER is the organization supplying the information and the TRANSMITTER is the organization preparing the electronic file and/or sending the file to IRS/ECC-MTB. The employer and the transmitter may be the same entity. Employers or their transmitters are required to complete Form 4419, Application for Filing Information Returns Electronically. The Form 4419 is subject to review before the approval to transmit electronically is granted and may require additional documentation at the request of the IRS. If a determination is made concerning the validity of the documents transmitted electronically, IRS has the authority to revoke the Transmitter Control Code (TCC) and terminate the release of files.
- .02 Form 4419 can be submitted at any time during the year; however, it should be submitted to IRS/ECC-MTB at least 30 days before the due date of the return(s). IRS will act on an application and notify the applicant, in writing, of authorization to file. A five-character alpha/numeric Transmitter Control Code (TCC) will be assigned and included in an acknowledgment letter within 15 to 45 days of receipt of the application. Electronic returns may not be filed with IRS until the application has been approved and a TCC assigned. Include your TCC in any correspondence with IRS/ECC-MTB.
- .03 If you file information returns other than Form 8027 electronically, you must obtain a separate TCC for those types of returns. The TCC assigned for Forms 8027 is to be used for the processing of these forms only.
- .04 After you have received approval to file electronically, you do not need to reapply each year; however, notify IRS in writing if:
 - (a) You change your name or the name of your organization, so that your files may be updated to reflect the proper name;
 - (b) You discontinue filing for two years (your TCC may have been reassigned).
- .05 IRS/ECC-MTB encourages filers who plan to submit for multiple employers to submit one application and to use one TCC for all employers.
- .06 Approval to file does not imply endorsement by IRS/ECC-MTB of any computer software or of the quality of tax preparation services provided by a service bureau or software vendor.

Sec. 7. State Abbreviations

- .01 The following state and U.S. possession abbreviations are to be used when developing the state code portion of address fields.

| State | Code | State | Code | State | Code |
|--------------------------------|------|------------------|------|---------------------|------|
| Alabama | AL | Kentucky | KY | No. Mariana Islands | MP |
| Alaska | AK | Louisiana | LA | Ohio | OH |
| American Samoa | AS | Maine | ME | Oklahoma | OK |
| Arizona | AZ | Marshall Islands | MH | Oregon | OR |
| Arkansas | AR | Maryland | MD | Pennsylvania | PA |
| California | CA | Massachusetts | MA | Puerto Rico | PR |
| Colorado | CO | Michigan | MI | Rhode Island | RI |
| Connecticut | CT | Minnesota | MN | South Carolina | SC |
| Delaware | DE | Mississippi | MS | South Dakota | SD |
| District of Columbia | DC | Missouri | MO | Tennessee | TN |
| Federated States of Micronesia | FM | Montana | MT | Texas | TX |
| Florida | FL | Nebraska | NE | Utah | UT |
| Georgia | GA | Nevada | NV | Vermont | VT |
| Guam | GU | New Hampshire | NH | Virginia | VA |
| Hawaii | HI | New Jersey | NJ | U.S. Virgin Islands | VI |
| Idaho | ID | New Mexico | NM | Washington | WA |
| Illinois | IL | New York | NY | West Virginia | WV |
| Indiana | IN | North Carolina | NC | Wisconsin | WI |
| Iowa | IA | North Dakota | ND | Wyoming | WY |
| Kansas | KS | | | | |

.02 Filers must adhere to the city, state, and ZIP Code format for U.S. addresses. This also includes American Samoa, Federated States of Micronesia, Guam, Marshall Islands, Commonwealth of the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.

Note: A Form 8027 is required only for establishments in the 50 states and the District of Columbia.

Sec. 8. Extension of Time

.01 An extension of time to file may be requested for Form 8027.

Note: IRS encourages the payer/transmitter community to utilize the online fill-in form in lieu of the paper Form 8809. No TCC required.

.02 A paper Form 8809, Request for Extension of Time To File Information Returns, should be submitted to IRS/ECC-MTB. This form may be used to request an extension of time to file information returns submitted on paper or electronically. All requests for an extension of time filed on Form 8809 should be sent using the following address:

IRS-Enterprise Computing Center — Martinsburg
Information Reporting Program
Attn: Extension of Time Coordinator
240 Murall Drive
Kearneysville, WV 25430

Note: Due to the large volume of mail received by IRS/ECC-MTB and the time factor involved in processing Extension of Time (EOT) requests, it is imperative that the attention line be present on all envelopes or packages containing Form 8809.

.03 The fill-in Form 8809 may be completed online via the FIRE System. (See Part B, Sec. 7, for instructions on connecting to the FIRE System.) At the Main Menu, click “Extension of Time Request” and then click “Fill-in Extension Form”. This option is only used to request an automatic 30-day extension. Extension requests completed online via the FIRE System receive an instant response. If you are requesting an additional extension, you must submit a paper Form 8809. Requests for an additional extension of time to file information returns are not automatically granted. Requests for additional time are granted only in cases of extreme hardship or catastrophic event. The IRS will only send a letter of explanation approving or denying your additional extension request. (Refer to .06 of this Section.)

.04 Filers requesting an extension of time for multiple employers may submit one Form 8809 and attach a list of the employer names and their Employer Identification Numbers (EINs). **The listing must be attached to ensure the extension is recorded for all employers.** Form 8809 may be computer-generated or photocopied. Be sure that all the pertinent information is included.

.05 Requests for extensions of time for multiple employers will be responded to with one approval letter, accompanied by a list of employers covered under that approval.

.06 As soon as it is apparent that an extension of time to file is needed, Form 8809 may be submitted. When granted, the extension will be for 30 days. It will take a minimum of 30 days for IRS/ECC-MTB to respond to an extension request. Under certain circumstances, a request for an extension of time could be denied. When a denial letter is received, any additional or necessary information may be resubmitted within 20 days. When requesting an extension of time, **do not** hold your files waiting for a response.

.07 While very difficult to obtain, if an additional extension of time is needed, a second Form 8809 must be submitted before the end of the initial extension period. Line 7 on the form should be checked to indicate that an additional extension is being requested. A second 30-day extension will be approved only in cases of extreme hardship or catastrophic events.

.08 Form 8809 must be postmarked no later than the due date of the return for which an extension is requested. If requesting an extension of time to file several types of forms, use one Form 8809, but the Form 8809 must be postmarked no later than the earliest due date. For example, if requesting an extension of time to file both Forms 8027 and 5498, submit Form 8809 postmarked on or before the last day of February.

.09 If an extension request is approved, the approval letter should be kept on file. The approval letter or copy of the approval letter for extension of time should **not** be sent to IRS/ECC-MTB with the electronic file. When submitting Form 8027 on **paper only** to the Cincinnati Service Center, attach a copy of the approval letter. If an approval letter has not been received, send a copy of the timely filed Form 8809.

.10 Request an extension for only one tax year.

.11 The extension request must be signed by the employer or a person who is duly authorized to sign a return, statement or other document for the employer.

.12 Failure to properly complete and sign the Form 8809 may cause delays in processing the request or result in a denial. Carefully read and follow the instructions on the back of the Form 8809.

.13 Form 8809 may be obtained by calling **1-800-TAX-FORM (1-800-829-3676)** or **downloading from www.irs.gov.**

Note: An extension of time to file is not an extension to furnish Form W-2 to the employee.

.14 Request an extension of time to furnish the statements to recipients of Forms W-2 by submitting a letter to IRS/ECC-MTB (See Part A, Sec. 3) containing the following information:

- (a) Employer name
- (b) EIN
- (c) Address
- (d) Type of return (W-2)
- (e) Specify that the extension request is to provide W-2 statements to recipients.
- (f) Reason for delay
- (g) Signature of employer or person duly authorized.

Requests for an extension of time to furnish the statements for Forms W-2 to recipients are not automatically approved; however, if approved, generally an extension will allow a maximum of 30 additional days from the due date to furnish the statements to the recipients. The request must be postmarked no later than the date on which the statements are due to the recipients.

Sec. 9. Penalties

.01 The Revenue Reconciliation Act of 1989 changed the penalty provisions for any documents, including corrections, which are filed after the original filing date for the return. The penalty for failure to file correct information returns is "time sensitive," in that prompt correction of failures to file, or prompt correction of errors on returns that were filed, can lead to reduced penalties.

- The penalty generally is \$50 for each information return that is not filed, or is not filed correctly, by the prescribed filing date, with a maximum penalty of \$250,000 per year (\$100,000 for certain small businesses with average annual gross receipts, over the most recent 3-year period, not in excess of \$5,000,000). The penalty generally is reduced to:
- \$30 for each failure to comply if the failure is corrected more than 30 days after the return was due, but on or before August 1 of the calendar year in which the return was due, with a maximum penalty of \$150,000 per year (\$50,000 for certain small businesses with average annual gross receipts, over the most recent 3-year period, not in excess of \$5,000,000).
- \$15 for each failure to comply if the failure is corrected within 30 days after the date the return was due, with a maximum penalty of \$75,000 per year (\$25,000 for certain small businesses with average annual gross receipts, over the most recent 3-year period, not in excess of \$5,000,000).

.02 Penalties can be waived if failures were due to reasonable cause and not to willful neglect. In addition, section 6721(c) of the Code provides a *de minimis* rule that if:

- (a) information returns have been filed but were filed with incomplete or incorrect information, and
- (b) the failures are corrected on or before August 1 of the calendar year in which the returns were due, then the penalty for filing incorrect returns (but not the penalty for filing late) will not apply to the greater of 10 returns or one-half of 1 percent of the total number of information returns you are required to file for the calendar year.

.03 Intentional Disregard of Filing Requirements — If any failure to file a correct information return is due to intentional disregard of the filing and correct information requirements, the penalty is at least \$100 per information return with no maximum penalty.

Sec. 10. Corrected Returns, Paper Forms, and Computer-Generated Forms

.01 If returns must be corrected, approved electronic filers must provide such corrections electronically for 250 or more forms. If your information is filed electronically, corrected returns are identified by using the “Corrected 8027 Indicator” in field position 370 of the employer record.

.02 A correction file must be identified by entering the correction indicator “G” in position 370.

.03 When replacing a correction file that was bad, you must submit a replacement file. Since you are replacing a correction file you must enter the correction indicator “G” in position 370.

.04 If corrections are not submitted electronically, employers must submit them on official Forms 8027. Substitute forms that have been previously approved by IRS, or computer-generated forms that are exact facsimiles of the official form (except for minor page size or print style deviations), may be submitted without obtaining IRS approval before using the form.

.05 Employers/establishments may send corrected paper Forms 8027 to IRS at the address shown in Part A, Sec. 10.06. Corrected paper returns are identified by marking the “AMENDED” check box on Form 8027.

.06 If you are filing more than one paper Form 8027, you must attach a completed Form 8027-T, Transmittal of Employer’s Annual Information Return of Tip Income and Allocated Tips, to the Forms 8027 and send to:

Department of the Treasury
Internal Revenue Service Center
Cincinnati, OH 45999

IRS/ECC-MTB processes Forms 8027 submitted electronically only. Do not send paper Forms 8027 to IRS/ECC-MTB.

.07 If part of a submission is filed electronically and the rest of the submission is filed on paper Forms 8027, send the paper forms to the Cincinnati Service Center. For example, you filed your Forms 8027 electronically with IRS/ECC-MTB, and later you found that some of the forms you filed need correcting. Because of the low volume of corrections, you submit the corrections on paper Forms 8027. You must send these corrected Forms 8027 along with Form 8027-T to the Cincinnati Service Center.

Sec. 11. Validation of Form 8027 at IRS/ECC-MTB

.01 The accuracy of data reported on Form 8027 will be validated at the IRS Service Center. All fields indicated as “Required” in the record layout must contain valid information. If the IRS identifies an error, you will be notified and required to provide correct information.

.02 The address for the establishment must agree with the state and ZIP Code. If there are inconsistencies or if the ZIP Code does not agree with the address, the record will error out.

.03 All alpha characters must be in upper case.

.04 The following is clarification of monetary amount requirements:

- (a) Charged Receipts (positions 260–271) must exceed Charged Tips (positions 248–259).
- (b) Total Tips Reported (positions 308–319) must equal the combined amount of the Indirect Tips (positions 284–295) and Direct Tips (positions 296–307).
- (c) Gross Receipts (positions 320–331) must exceed all other monetary amounts with the exception of Charged Receipts. It is possible to equal Charged Receipts if all transactions were conducted on charge cards.
- (d) The Tip Percentage Rate Times Gross Receipts (332–343) must equal the Gross Receipts times the Tip Rate. Normally, the Tip Rate is 8%. The Tip Rate must be entered as 0800 in positions 344–347 unless you have been granted a lower rate by the IRS.
- (e) Generally, you would have allocated tips if the Total Tips Reported (positions 308–319) is less than the Tip Percentage Rate Times Gross Receipts (positions 332–343). The difference must be entered as Allocated Tips (positions 348–359).

Sec. 12. Definition of Terms

| ELEMENT | DESCRIPTION |
|--------------------------------|--|
| Correction | A correction is an information return submitted by the employer/transmitter to correct an information return that was previously submitted to and successfully processed by IRS, but contained erroneous information. |
| EIN | A nine-digit Employer Identification Number which has been assigned by IRS to the reporting entity. |
| Employees hours worked | The average number of employee hours worked per business day during a month is figured by dividing the total hours worked during the month by all your employees who are employed in a food or beverage operation by the average number of days in the month that each food or beverage operation at which these employees worked was open for business. |
| Employer | The organization supplying their information. Use the same name and EIN you used on your Forms W-2 and Forms 941. |
| Establishment | A large food or beverage establishment that provides food or beverage for consumption on the premises; where tipping is a customary practice; and where there are normally more than 10 employees who work more than 80 hours on a typical business day during the preceding calendar year. |
| File | For the purpose of this revenue procedure, a file is the Form 8027 information submitted electronically by an Employer or Transmitter. |
| More than 10 employees | An employer is considered to have more than 10 employees on a typical business day during the calendar year if half the sum of: the average number of employee hours worked per business day in the calendar month in which the aggregate gross receipts from food and beverage operations were greatest, plus the average number of employee hours worked per business day in the calendar month in which the total aggregate gross receipts from food and beverage operations were the least, equals more than 80 hours. |
| Replacement | A replacement is an information return file sent by the employer/transmitter at the request of IRS/ECC-MTB because of errors encountered while processing the filer's original file or correction file. |
| Transmitter | Person or organization preparing electronic file(s). May be employer or agent of employer. |
| Transmitter Control Code (TCC) | A five-character alpha/numeric code assigned by IRS to the transmitter prior to actual filing electronically. This number is inserted in the record and must be present. An application (Form 4419) must be filed with IRS to receive this number. |

Part B. Electronic Filing Specifications

Note: The FIRE System DOES NOT provide fill-in forms, except for Form 8809, Application for Extension of Time to File Information Returns. Filers must program files according to the Record Layout Specifications contained in this publication.

Sec. 1. General

.01 Electronic filing of Forms 8027 information returns, originals and replacements, is a reporting method for filers submitting 250 or more Forms 8027. Payers who are under the filing threshold requirement, are encouraged to file electronically.

.02 All electronic filing of information returns are received at IRS/ECC-MTB via the FIRE (Filing Information Returns Electronically) System. To connect to the FIRE System, point your browser to <http://fire.irs.gov>. The system is designed to support the electronic filing of information returns only.

.03 The electronic filing of information returns is not affiliated with any other IRS electronic filing programs. Filers must obtain separate approval to participate in each program. Only inquiries concerning electronic filing of information returns should be directed to IRS/ECC-MTB.

.04 Files submitted to IRS/ECC-MTB electronically must be in standard ASCII code. Do not submit paper forms with the same information as electronically submitted files. This would create duplicate reporting resulting in penalty notices.

.05 Form 8809, Application for Extension of Time to File Information Returns, is available as a fill-in form via the FIRE System. If you do not already have a User ID and password refer to Section 7. At the Main Menu, click "Extension of Time Request" and

then click “Fill-in Extension Form”. This option is only used to request an automatic 30-day extension and must be completed by the due date of the return for each payer requesting an extension. Print the approval page for your records. Refer to Part A, Sec. 8 for additional details.

Sec. 2. Electronic Filing Approval Procedure

.01 Filers must obtain a Transmitter Control Code (TCC) prior to submitting files electronically. Filers who previously had a TCC for magnetic media filing of Form 8027 may use their assigned TCC for electronic filing. Refer to Part A, Sec. 6, for information on how to obtain a TCC.

.02 Once a TCC is obtained, electronic filers assign their own user ID, password and PIN (Personal Identification Number) and do not need prior or special approval. See Part B, Sec. 5, for more information on the PIN.

.03 If a filer is submitting files for more than one TCC, it is not necessary to create a separate logon and password for each TCC.

.04 For all passwords, it is the user’s responsibility to remember the password and not allow the password to be compromised. Passwords are user assigned at first logon and must be 8 alpha/numeric characters containing at least 1 uppercase, 1 lowercase, and 1 numeric. However, filers who forget their password or PIN, can call **toll-free 1-866-455-7438** for assistance. Users can change their passwords at any time from the main menu. The FIRE System will require users to change their passwords periodically.

Sec. 3. Test Files

.01 Filers are not required to submit a test file; however, the submission of a test file is encouraged for all new electronic filers to test hardware and software. If filers wish to submit an electronic test file for Tax Year 2009 (returns to be filed in 2010), it **must** be submitted to IRS/ECC-MTB **no earlier than** November 1, 2009, and **no later than** February 15, 2010.

.02 Filers who encounter problems while transmitting the electronic test file can contact IRS/ECC-MTB **toll-free 1-866-455-7438** for assistance.

.03 Within 5 days, the results of the electronic transmission will be e-mailed to you providing you provide an accurate e-mail address on the “Verify Your Filing Information” screen. If you are using e-mail filtering software, configure your software to accept e-mail from *fire@irs.gov* and *irs.e-helpmail@irs.gov*. If after receiving the e-mail it indicates that your file is bad, you must log into the FIRE System and go to the CHECK FILE STATUS area of the FIRE System to determine what the errors are in your file. If you do not receive an e-mail in 5 business days, log back into the FIRE System and click on CHECK FILE STATUS to view the results of your file.

Sec. 4. Electronic Submissions

.01 Electronically filed information may be submitted to IRS/ECC-MTB 24 hours a day, 7 days a week. Technical assistance will be available Monday through Friday between 8:30 a.m. and 4:30 p.m. Eastern time by calling **toll-free 1-866-455-7438**.

.02 **The FIRE System will be down from the last week of December through the first week of January.** This allows IRS/ECC-MTB to update its system to reflect current year changes.

.03 If you are sending files larger than 10,000 records electronically, data compression is encouraged. If you are considering sending files larger than 5 million records, please contact IRS/ECC-MTB for specifics. WinZip and PKZip are the only acceptable compression packages. IRS/ECC-MTB cannot accept self-extracting zip files or compressed files containing multiple files. The time required to transmit information returns electronically will vary depending upon the type of connection to the Internet and if data compression is used. **The time required to transmit a file can be reduced by as much as 95 percent by using compression.**

.04 Transmitters may create files using self assigned files name(s). Files submitted electronically will be assigned a new unique file name by the FIRE System. The file name assigned by the FIRE System will consist of submission type (ORIG [original], TEST [test], CORR [correction], and REPL [replacement]), the filer’s TCC and a four-digit number sequence. The sequence number will be incremented for every file sent. For example, if it is your first original file for the calendar year and your TCC is 21000, the IRS assigned file name would be ORIG.21000.0001. **Record the file name.** This information will be needed by IRS/ECC-MTB to identify the file, if assistance is required.

.05 If a file was submitted timely and is bad, the filer will have up to 60 days from the date the file was sent to transmit an acceptable file. If an acceptable file is not received within 60 days, then the payer could be subject to late filing penalties.

.06 The following definitions have been provided to help distinguish between a correction and a replacement:

- A **correction** is an information return submitted by the transmitter to correct an information return that was previously submitted to and successfully processed by IRS/ECC-MTB, but contained erroneous information. **(See Note.)**

Note: Corrections should only be made to forms that have been submitted incorrectly, not the entire file.

- A **replacement** is an information return file sent by the filer because the CHECK FILE STATUS option on the FIRE System indicated the original/correction file was bad. After the necessary changes have been made, the file must be transmitted through the FIRE System. **(See Note.)**

Note: Filers should never transmit anything to IRS/ECC-MTB as a “Replacement” file unless the CHECK FILE STATUS option on the FIRE System indicates the file is bad.

.07 Prior year data may be submitted, however, each tax year must be submitted in a separate file transmission.

Sec. 5. PIN Requirements

.01 Filers will be prompted to create a PIN consisting of 10 numeric characters when establishing their initial logon name and password.

.02 The PIN is required each time an ORIGINAL, CORRECTION, or REPLACEMENT file is sent electronically and is permission to release the file. It is not needed for a TEST file. An authorized agent may enter their PIN, however, the payer is responsible for the accuracy of the returns. The payer will be liable for penalties for failure to comply with filing requirements. If you forget your PIN, please call **toll-free 1-866-455-7438** for assistance.

Sec. 6. Electronic Filing Specifications

.01 The FIRE System is designed exclusively for the filing of Forms 8027, 1098, 1099, 3921, 3922, 5498, 8935, W-2G, and 1042-S.

.02 A transmitter must have a TCC (see Part A, Sec. 6) before a file can be transmitted.

.03 Within 5 days, the results of the electronic transmission will be e-mailed to you providing you provide an accurate e-mail address on the “Verify Your Filing Information” screen. If you are using e-mail filtering software, configure your software to accept e-mail from *fire@irs.gov* and *irs.e-helpmail@irs.gov*. If after receiving the e-mail it indicates that your file is bad, you must log into the FIRE System and go to the CHECK FILE STATUS area of the FIRE System to determine what the errors are in your file. If you do not receive an e-mail in 5 business days, log back into the FIRE System and click on CHECK FILE STATUS to view the results of your file.

Sec. 7. Connecting to the FIRE System

.01 Point your browser to *http://fire.irs.gov* to connect to the FIRE System.

.02 Before connecting, have your TCC and TIN available.

.03 Your browser must support SSL 128-bit encryption.

.04 FIRE Internet Security Technical Standards are:

HTTP 1.1 Specification (<http://www.w3.org/Protocols/rfc2616/rfc2616.txt>)

SSL 3.0 or TLS 1.0. SSL and TLS are implemented using SHA and RSA 1024 bits during the asymmetric handshake.

SSL 3.0 Specifications (<http://wp/netscape.com/eng/ssl3>)

TLS 1.0 Specifications (<http://www.ietf.org/rfc/rfc2246.txt>)

The filer can use one of the following encryption algorithms, listed in order of priority, using SSL or TLS:

**AES 256-bit (FIPS-197)*

**AES 128-bit (FIPS-197)*

TDES 168-bit (FIPS-46-3)

***RC4 128-bit*

**IRS intends to start offering this sometime during the period of this publication. If you plan to use it, please contact us to see if it is available.*

*** IRS intends to drop this non-FIPS algorithm during the period of this publication after the Service starts offering AES.*

First time connection to the FIRE System (If you have logged on previously, skip to Subsequent Connections to the FIRE System.)

Click “**Create New Account**”.

Fill out the registration form and click “**Submit**”.

Enter your **User ID** (most users logon with their first and last name).

Enter and verify your **password** (the password is user assigned and must be 8 alpha/numerics, containing at least 1 uppercase, 1 lowercase and 1 numeric). FIRE may require you to change the password once a year.

Click “**Create**”.

If you receive the message “**Account Created**”, click “**OK**”.

Enter and verify your 10-digit self-assigned PIN (Personal Identification Number).
Click ***“Submit”***.
If you receive the message ***“Your PIN has been successfully created!”***, click ***“OK”***.
Read the bulletin(s) and/or click ***“Click here to continue”***.

Subsequent connections to the FIRE System

Click ***“Log On”***.
Enter your ***User ID*** (most users logon with their first and last name).
Enter your ***password*** (the password is user assigned and is case sensitive).
Read the bulletins and/or click ***“Click here to continue”***.

Uploading your file to the FIRE System

At Menu Options:

Click ***“Send Information Returns”***
Enter your ***TCC***:
Enter your ***TIN***:
Click ***“Submit”***.

The system will then display the company name, address, city, state, ZIP Code, phone number, contact and e-mail address. This information will be used to e-mail the transmitter regarding this transmission. Update as appropriate and/or Click ***“Accept”***.

Note: Please ensure that the e-mail is accurate so that the correct person receives the e-mail and it does not return to us undeliverable. If you are using SPAM filtering software, please configure it to allow an e-mail from *fire@irs.gov* and *irs.e-helpmail@irs.gov*.

Click one of the following:

Original File
Correction File
Test File (This option will only be available November through mid-February.)
Replacement File (Click on the file to be replaced.)

- **Electronic Replacement** (file was originally transmitted on this system)
Click the file to be replaced.

When the upload is complete, the screen will display the total bytes received and tell you the name of the file you just uploaded.

If you have more files to upload for that TCC:
Click ***“File Another?”***; otherwise,
Click ***“Main Menu”***.

If you do not receive an e-mail in 5 business days or your e-mail indicates the file is bad, log back into the FIRE System and click on CHECK FILE STATUS to view the results of your file.

Checking your FILE STATUS

At the Main Menu:

Click ***“Check File Status”***.

Enter your ***TCC***:

Enter your ***TIN***:

Click ***“Search”***.

If “Results” indicate:

“Good Not Released” — If you agree with the record count, you are finished with this file. The file will automatically be released after 10 calendar days unless you contact us within this time frame.

“Good, Released” — File has been released to our mainline processing.

“Bad” — Correct the errors and timely resubmit the file as a “replacement”.

“Not yet processed” — File has been received, but we do not have results available yet. Please check back in a few days.

Click on the desired file for a detailed report of your transmission.

When you are finished, click on ***Main Menu***.

Click ***“Log Out”***

Close your Web Browser.

Sec. 8. Common Problems and Questions Associated with Electronic Filing

.01 The following are the major errors associated with electronic filing:

NON-FORMAT ERRORS

1. SPAM filters are not set to receive e-mail from *fire@irs.gov* and *irs.e-helpmail@irs.gov*.

If you want to receive e-mails concerning your files, processing results, reminders and notices, set your SPAM filter to receive e-mail from *fire@irs.gov* and *irs.e-helpmail@irs.gov*.

2. Incorrect e-mail provided.

When the “Verify Your Filing Information” screen is displayed, make sure your correct e-mail is displayed. If not, please update with the correct e-mail.

3. Transmitter does not check the FIRE System to determine file acceptability.

The results of your file transfer are posted to the FIRE System within 3 business days. If the correct e-mail address was provided on the “Verify Your Filing Information” screen when the file was sent, an e-mail will be sent regarding your FILE STATUS. If the results in the e-mail indicate “Good, Released” and you agree with the “Record Count”, then you are finished with this file. If you have any other results, please follow the instructions in the Check File Status option. If the file contains errors, you can get an online listing of the errors. Date received and number of payee records is also displayed. If the file is good, but you do not want the file processed, you must contact IRS/ECC-MTB within 10 calendar days from the date of transmission of your file.

4. Replacement file is not submitted timely.

If your file is bad, correct the file and timely resubmit as a replacement.

5. Transmitter compresses several files into one.

Only compress one file at a time. For example, if you have 10 uncompressed files to send, compress each file separately and send 10 separate compressed files.

6. Transmitter sends an original file that is good, and then sends a correction file for the entire file even though there are only a few changes.

The correction file, containing the proper coding, should only contain the records requiring correction, not the entire file.

7. File is formatted as EBCDIC.

All files submitted electronically must be in standard ASCII code. All alpha characters must be uppercase.

8. Transmitter has one TCC number, but is filing for multiple companies, which TIN should be used when logging into the system to send the file?

When sending the file electronically, you will need to enter the TIN of the company assigned to the TCC. When you upload the file, it will contain the TINs for the other companies that you are filing for. This is the information that will be passed forward.

9. Transmitter sent the wrong file, what should be done?

Call us as soon as possible **toll-free 1-866-455-7438**. We may be able to stop the file before it has been processed. **Please do not send a replacement for a file that is marked as a good file.**

Part C. Filing Specifications and Record Layout

.01 If the file does not meet these specifications, IRS/ECC-MTB will request a replacement file. Filers are encouraged to submit a test prior to submitting the actual file. Contact IRS/ECC-MTB **toll-free 1-866-455-7438** for further information.

Note: The only allowable characters in name and address fields are alphas, numeric characters, and blanks. Punctuation such as periods, hyphens, ampersands, slashes and commas are not allowed and will cause your file to be rejected. For example, O’Hurley’s Bar & Grill, 210 N. Queen St., Suite #300 must be entered as OHurleys Bar Grill 210 N Queen St Suite 300.

Sec. 1. Record Format and Layout

FORM 8027 RECORD FORMAT

| Field Position | Field Title | Length | Description and Remarks |
|----------------|------------------------------|--------|--|
| 1 | Establishment Type | 1 | Required. This number identifies the kind of establishment. Enter the number which describes the type of establishment, as shown below: 1. for an establishment that serves evening meals only (with or without alcoholic beverages). 2. for an establishment that serves evening meals and other meals (with or without alcoholic beverages). 3. for an establishment that serves only meals other than evening meals (with or without alcoholic beverages). 4. for an establishment that serves food, if at all, only as an incidental part of the business of serving alcoholic beverages. |
| 2-6 | Establishment Serial Numbers | 5 | Required. These five-digit Serial Numbers are for identifying individual establishments of an employer reporting under the same EIN. The employer shall assign each establishment a unique number. Numeric characters only. |
| 7-46 | Establishment Name | 40 | Required. Enter the name of the establishment. Left-justify and fill unused positions with blanks. Allowable characters are alphas, numeric, and blanks. |
| 47-86 | Establishment Street Address | 40 | Required. Enter the mailing address of the establishment. Street address should include number, street, apartment or suite number (use P O Box only if mail is not delivered to street address). Left-justify and blank fill. Allowable characters are alphas, numeric, and blanks. |
| 87-111 | Establishment City | 25 | Required. Enter the city, town, or post office. Left-justify and blank fill. Allowable characters are alphas, numeric, and blanks. |

FORM 8027 RECORD FORMAT

| Field Position | Field Title | Length | Description and Remarks |
|--|-------------------------------------|---------------|--|
| 112–113 | Establishment State | 2 | Required. Enter the state code from the state abbreviations table in Part A, Sec. 7. |
| 114–122 | Establishment ZIP Code | 9 | Required. Enter the complete nine-digit ZIP Code of the establishment. If using a five-digit ZIP Code, left-justify the five-digit ZIP Code and fill the remaining four positions with blanks. |
| Note: Must be nine numeric characters or 5 numeric characters and four blanks. Do not enter the dash. | | | |
| 123–131 | Employer Identification Number | 9 | Required. Enter the nine-digit number assigned to the employer by IRS. Do not enter hyphens, alphas, all 9s or all zeros. |
| 132–171 | Employer Name | 40 | Required. Enter the name of the employer as it appears on your tax forms (<i>e.g.</i> , Form 941). Any extraneous information must be deleted. Left-justify and blank fill. Allowable characters are alphas, numeric, and blanks. |
| 172–211 | Employer Street Address | 40 | Required. Enter mailing address of employer. Street address should include number, street, apartment or suite number (use P O Box only if mail is not delivered to street address). Left-justify and blank fill. Allowable characters are alphas, numeric, and blanks. |
| 212–236 | Employer City | 25 | Required. Enter the city, town, or post office. Left-justify and blank fill. Allowable characters are alphas, numeric, and blanks. |
| 237–238 | Employer State | 2 | Required. Enter the state code from the state abbreviations table in Part A, Sec. 7. |
| 239–247 | Employer ZIP Code | 9 | Required. Enter the complete nine-digit ZIP Code of the establishment. If using a five-digit ZIP Code, left-justify the five-digit ZIP Code and fill the remaining four positions with blanks. |
| Note: Must be nine numeric characters or 5 numeric characters and four blanks. Do not enter the dash. | | | |
| 248–259 | Charged Tips | 12 | Required. Enter the total amount of tips that are shown on charge receipts for the calendar year. Amount must be entered in U.S. dollars and cents. The right-most two positions represent cents. Right-justify and zero fill. If no entry, zero fill. Numeric characters only. Do not enter decimal points, dollars signs, or commas. |
| 260–271 | Charged Receipts | 12 | Required. Enter the total sales for the calendar year other than carry-out sales or sales with an added service charge of 10 percent or more, that are on charge receipts with a charged tip shown. This includes credit card charges, other credit arrangements, and charges to a hotel room unless the employer's normal accounting practice consistently excludes charges to a hotel room. Do not include any state or local taxes in the amount reported. Amount must be entered in U.S. dollars and cents. The right-most two positions represent cents. Right-justify and zero fill. If no entry, zero fill. Numeric characters only. Do not enter decimal points, dollars signs, or commas. |
| 272–283 | Service Charge Less Than 10 Percent | 12 | Required. Enter the total amount of service charges less than 10 percent added to customer's bills and were distributed to your employees for the calendar year. In general, service charges added to the bill are not tips since the customer does not have a choice. These service charges are treated as wages and are included on Form W-2. Amount must be entered in U.S. dollars and cents. The right-most two positions represent cents. Right-justify and zero fill. If no entry, zero fill. Numeric characters only. Do not enter decimal points, dollars signs, or commas. |

FORM 8027 RECORD FORMAT

| Field Position | Field Title | Length | Description and Remarks |
|-----------------------|------------------------|---------------|---|
| 284–295 | Indirect Tips Reported | 12 | Required. Enter the total amount of tips reported by indirectly tipped employees (<i>e.g.</i> , bussers, service bartenders, cooks) for the calendar year. Do not include tips received by employees in December of the prior tax year but not reported until January. Include tips received by employees in December of the tax year being reported, but not reported until January of the subsequent year. Amount must be entered in U.S. dollars and cents. The right-most two positions represent cents. Right-justify and zero fill. If no entry, zero fill. Numeric characters only. Do not enter decimal points, dollars signs, or commas. |
| 296–307 | Direct Tips Reported | 12 | Required. Enter the total amount of tips reported by directly tipped employees (<i>e.g.</i> , servers, bartenders) for the calendar year. Do not include tips received by employees in December of the prior tax year but not reported until January. Include tips received by employees in December of the tax year being reported, but not reported until January of the subsequent year. Amount must be entered in U.S. dollars and cents. The right-most two positions represent cents. Right-justify and zero fill. If no entry, zero fill. Numeric characters only. Do not enter decimal points, dollars signs, or commas. |
| 308–319 | Total Tips Reported | 12 | Required. Enter the total amount of tips reported by all employees (both indirectly tipped and directly tipped) for the calendar year. Do not include tips received in December of the prior tax year but not reported until January. Include tips received in December of the tax year being reported, but not reported until January of the subsequent year. Amount must be entered in U.S. dollars and cents. The right-most two positions represent cents. Right-justify and zero fill. If no entry, zero fill. Numeric characters only. Do not enter decimal points, dollars signs, or commas. |
| 320–331 | Gross Receipts | 12 | Required. Enter the total gross receipts from the provision of food and/or beverages for this establishment for the calendar year. Do not include receipts for carry-out sales or sales with an added service charge of 10 percent or more. Do not include in gross receipts charged tips (field positions 248–259) shown on charge receipts unless you have reduced the cash sales amount because you have paid cash to tipped employees for tips they earned that were charged. Do not include state or local taxes in gross receipts. If you do not charge separately for food or beverages along with other services (such as a package deal for food and lodging), make a good faith estimate of the gross receipts attributable to the food or beverages. This estimate must reflect the cost of providing the food or beverages plus a reasonable profit factor. Include the retail value of complimentary food or beverages served to customers if tipping for them is customary and they are provided in connection with an activity engaged in for profit whose receipts would not be included as gross receipts from the provision of food or beverages (<i>e.g.</i> , complimentary drinks served to customers at a gambling casino). Amount must be entered in U.S. dollars and cents. The right-most two positions represent cents. Right-justify and zero fill. If no entry, zero fill. Numeric characters only. Do not enter decimal points, dollars signs, or commas. |

FORM 8027 RECORD FORMAT

| Field Position | Field Title | Length | Description and Remarks |
|---|--|---------------|--|
| 332–343 | Tip Percentage Rate Times Gross Receipts | 12 | Required. Enter the amount determined by multiplying Gross Receipts for the year (field positions 320–331) by the Tip Percentage Rate (field positions 344–347). For example, if the value of Gross Receipts is “000045678900” and Tip Percentage Rate is “0800”, multiply \$456,789.00 by .0800 to get \$36,543.12 and enter “000003654312”. If tips are allocated using other than the calendar year, enter zeros; this may occur if you allocated tips based on the time period for which wages were paid or allocated on a quarterly basis. Amount must be entered in U.S. dollars and cents. The right-most two positions represent cents. Right-justify and zero fill. If no entry, zero fill. Numeric characters only. Do not enter decimal points, dollars signs, or commas. |
| 344–347 | Tip Percentage Rate | 4 | Required. Enter 8 percent (0800) unless a lower rate has been granted by the IRS. The determination letter must follow the electronic submission. See Part A, Sec. 4, .06 for details. Numeric characters only. Do not enter decimal points, dollars signs, or commas. |
| 348–359 | Allocated Tips | 12 | Required. If Tip Percentage Rate times Gross Receipts (field positions 332–343) is greater than Total Tips Reported (field positions 308–319), then the difference becomes Allocated Tips. Otherwise, enter all zeros. If tips are allocated using other than the calendar year, enter the amount of allocated tips from your records. Amount must be entered in U.S. dollars and cents. The right-most two positions represent cents. Right-justify and zero fill. If no entry, zero fill. Numeric characters only. Do not enter decimal points, dollars signs, or commas. |
| 360 | Allocation Method | 1 | Required. Enter the allocation method used if Allocated Tips (field positions 348–359) are greater than zero as follows: 0) if allocated tips are equal to zero. 1) for allocation based on hours worked. 2) for allocation based on gross receipts. 3) for allocation based on a good faith agreement. The good faith agreement must follow the electronic submission. See Part A, Sec. 4, .05 for details. |
| Note: The method of allocation of tips based on the number of hours worked as described in Section 31.6053–3(f)(1)(iv) may be utilized only by an employer that employs less than the equivalent of 25 full-time employees at the establishment during the payroll period. Section 31.6053–3(j)(19) provides that an employer is considered to employ less than the equivalent of 25 full-time employees at an establishment during a payroll period if the average number of employee hours worked per business day during the payroll period is less than 200 hours. | | | |
| 361–364 | Number of Directly Tipped Employees | 4 | Required. Enter the total number (must be greater than zero) of directly tipped employees employed by the establishment for the calendar year. Right-justify and zero fill. Numeric characters only. |
| 365–369 | Transmitter Control Code (TCC) | 5 | Required. Enter the 5-digit Transmitter Control Code assigned by the IRS. |
| 370 | Corrected 8027 Indicator | 1 | Required. Enter blank for original return. Enter “G” for corrected return. A corrected return must be a complete new return replacing the original return. |
| 371 | Final Return Indicator | 1 | Required. Enter the appropriate code: F) if this is the last time you will file Form 8027 N) if this is not the last time you will file Form 8027 Do not enter a blank. |
| 372 | Charge Card Indicator | 1 | Required. Enter the appropriate code: 1) if your establishment accepts credit cards, debit cards or other charges. 2) if your establishment does not accept credit cards, debit cards or other charges. |
| 373 | ATIP Indicator | 1 | Required. Enter “T” if you are participating in the Attributed Tip Income Program; otherwise, enter a blank. |

FORM 8027 RECORD FORMAT

| Field Position | Field Title | Length | Description and Remarks |
|----------------|-----------------------------|--------|---|
| 374 | Liable/Not Liable Indicator | 1 | Required. Enter the appropriate code: N) if you are not liable to file Form 8027 Y) if you are liable to file Form 8027 Do not enter a blank. |
| 375–378 | Tax Year | 4 | Required. Enter the 4-digit tax year. |
| 379 | Prior Year Indicator | 1 | Required. Enter a “P” only if reporting prior year data; otherwise, enter a blank. |
| 380 | Test File Indicator | 1 | Required for test files only. Enter “T” if this is a test file; otherwise, enter a blank. |
| 381–410 | Reserved | 30 | Enter blanks. |
| 411–418 | Record Sequence Number | 8 | Required. Enter the number of the record as it appears within your file. The first record in your file will be “1” and each record, thereafter, must be incremented by one in ascending numerical sequence, <i>i.e.</i> 2, 3, 4, etc. Right-justify numbers with leading zeros in the field. For example the first record in the file would appear as “00000001”, followed by “00000002”, “00000003” and so on until you reach the final record of the file. |
| 419–420 | Blank | 2 | Enter blanks or CR/LF characters. |

FORM 8027 RECORD LAYOUT

| Establishment Type | Establishment Serial Numbers | Establishment Name | Establishment Street Address |
|--------------------|------------------------------|--------------------|------------------------------|
| 1 | 2–6 | 7–46 | 47–86 |

| Establishment City | Establishment State | Establishment ZIP Code | Employer Identification Number |
|--------------------|---------------------|------------------------|--------------------------------|
| 87–111 | 112–113 | 114–122 | 123–131 |

| Employer Name | Employer Street Address | Employer City | Employer State |
|---------------|-------------------------|---------------|----------------|
| 132–171 | 172–211 | 212–236 | 237–238 |

| Employer Zip Code | Charged Tips | Charged Receipts | Service Charge Less Than 10 Percent |
|-------------------|--------------|------------------|-------------------------------------|
| 239–247 | 248–259 | 260–271 | 272–283 |

| Indirect Tips Reported | Direct Tips Reported | Total Tips Reported | Gross Receipts |
|------------------------|----------------------|---------------------|----------------|
| 284–295 | 296–307 | 308–319 | 320–331 |

| Tip Percentage Rate Times Gross Receipts | Tip Percentage Rate | Allocated Tips | Allocation Method |
|---|---------------------|----------------|-------------------|
| 332–343 | 344–347 | 348–359 | 360 |

| Number of Directly Tipped Employees | Transmitter Control Code (TCC) | Corrected 8027 Indicator | Final Return Indicator |
|--|-----------------------------------|--------------------------|------------------------|
| 361–364 | 365–369 | 370 | 371 |

| Charge Card Indicator | ATIP Indicator | Liable/Not Liable Indicator | Tax Year | Prior Year Indicator |
|-----------------------|----------------|--------------------------------|----------|----------------------|
| 372 | 373 | 374 | 375–378 | 379 |

| Test File Indicator | Reserved | Record Sequence Number | Blank or CR/LF |
|---------------------|----------|------------------------|----------------|
| 380 | 381–410 | 411–418 | 419–420 |

26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.
(Also: Part I, §§ 62, 162, 267, 274; 1.62–2, 1.162–17, 1.267(a)–1, 1.274–5.)

Rev. Proc. 2009–47

SECTION 1. PURPOSE

This revenue procedure updates Rev. Proc. 2008–59, 2008–41 I.R.B. 857, and provides rules under which the amount of ordinary and necessary business expenses of an employee for lodging, meal, and incidental expenses, or for meal and incidental expenses, incurred while traveling away from home are deemed substantiated under § 1.274–5 of the Income Tax Regulations when a payor (the employer, its agent, or a third party) provides a *per diem* allowance under a reimbursement or other expense allowance arrangement to pay for the expenses. In addition, this revenue procedure provides an optional method for employees and self-employed individuals who are not reimbursed to use in computing the amounts paid or incurred for business meal and incidental expenses, or for incidental expenses only if no meal expenses are paid or incurred, while traveling away from home. Use of a method described in this revenue procedure is not mandatory, and a taxpayer may use actual allowable expenses if the taxpayer maintains adequate records or other sufficient

evidence for proper substantiation. This revenue procedure does not provide rules under which the amount of an employee's lodging expenses are deemed substantiated to a payor when a payor provides an allowance to pay for lodging expenses but not meal and incidental expenses.

SECTION 2. BACKGROUND AND CHANGES

.01 Section 162(a) of the Internal Revenue Code allows a deduction for all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. Under that provision, an employee or self-employed individual may deduct expenses paid or incurred while traveling away from home in pursuit of a trade or business. However, under § 262, no portion of travel expenses attributable to personal, living, or family expenses is deductible.

.02 Section 274(n) generally limits the amount allowable as a deduction under § 162 for any expense for food, beverages, or entertainment to 50 percent of the amount of the expense that otherwise would be allowable as a deduction. In the case of any expenses for food or beverages consumed while away from home (within the meaning of § 162(a)(2)) by an individual during, or incident to, the period of duty subject to the hours of service limitations of the Department of Transportation, § 274(n)(3) provides that, for taxable

years beginning in 2009 or thereafter, the deductible percentage for these expenses is 80 percent.

.03 Section 274(d) provides, in part, that no deduction is allowed under § 162 for any travel expense (including meals and lodging while away from home) unless a taxpayer complies with certain substantiation requirements. Section 274(d) further provides that regulations may prescribe that some or all of the substantiation requirements do not apply to an expense that does not exceed an amount prescribed by the regulations.

.04 Section 1.274–5(g), in part, grants the Commissioner the authority to prescribe rules relating to reimbursement arrangements or *per diem* allowances for ordinary and necessary expenses paid or incurred while traveling away from home. Under this grant of authority, the Commissioner may prescribe rules under which these arrangements or allowances, if in accordance with reasonable business practice, are regarded (1) as equivalent to substantiation, by adequate records or other sufficient evidence, of the amount of travel expenses for purposes of § 1.274–5(c), and (2) as satisfying the requirements of an adequate accounting to the employer of the amount of travel expenses for purposes of § 1.274–5(f).

.05 For purposes of determining adjusted gross income, § 62(a)(2)(A) allows an employee a deduction for expenses allowed by Part VI (§ 161 and following),

subchapter B, chapter 1 of the Code, the employee pays or incurs in performing services as an employee under a reimbursement or other expense allowance arrangement with a payor.

.06 Section 62(c) provides that an arrangement is not treated as a reimbursement or other expense allowance arrangement for purposes of § 62(a)(2)(A) if it—

(1) Does not require the employee to substantiate the expenses covered by the arrangement to the payor, or

(2) Provides the employee with the right to retain any amount in excess of the substantiated expenses covered under the arrangement.

Section 62(c) further provides that these substantiation requirements do not apply to any expense to the extent that, under the grant of regulatory authority in § 274(d), the Commissioner provides that substantiation is not required for the expense.

.07 Under § 1.62–2(c), a reimbursement or other expense allowance arrangement satisfies the requirements of § 62(c) if it meets the requirements of business connection, substantiation, and returning amounts in excess of expenses as specified in the regulations. If an arrangement meets these requirements, all amounts paid under the arrangement are treated as paid under an accountable plan and are excluded from income and wages. If an arrangement does not meet these requirements, all amounts paid under the arrangement are treated as paid under a nonaccountable plan and are included in an employee's gross income, must be reported as wages or compensation on the employee's Form W–2, and are subject to the withholding and payment of employment taxes. Section 1.62–2(e)(2) specifically provides that substantiation of certain business expenses in accordance with rules prescribed under the authority of § 1.274–5(g) is treated as substantiation of the amount of the expenses for purposes of § 1.62–2. Under § 1.62–2(f)(2), the Commissioner may prescribe rules under which an arrangement providing *per diem* allowances is treated as satisfying the requirement of returning amounts in excess of expenses, even though the arrangement does not require the employee to return the portion of the allowance that relates to days of travel substantiated and that exceeds the amount of the employee's expenses deemed substantiated under rules prescribed under § 274(d), provided the

allowance is reasonably calculated not to exceed the amount of the employee's expenses or anticipated expenses and the employee is required to return within a reasonable period of time any portion of the allowance that relates to days of travel not substantiated.

.08 Section 1.62–2(h)(2)(i)(B) provides that, if a payor pays a *per diem* allowance that meets the requirements of § 1.62–2(c)(1), the portion, if any, of the allowance that relates to days of travel substantiated in accordance with § 1.62–2(e), that exceeds the amount of an employee's expenses deemed substantiated for the travel under rules prescribed under § 274(d) and § 1.274–5(g), and that the employee is not required to return, is subject to withholding and payment of employment taxes. See §§ 31.3121(a)–3, 31.3231(e)–1(a)(5), 31.3306(b)–2, and 31.3401(a)–4 of the Employment Tax Regulations. Because the employee is not required to return this excess portion, the reasonable period of time provisions of § 1.62–2(g) (relating to the return of excess amounts) do not apply to this portion.

.09 Under § 1.62–2(h)(2)(i)(B)(4), the Commissioner has the discretion to prescribe special rules regarding the timing of withholding and payment of employment taxes on *per diem* allowances.

.10 Section 1.274–5(j)(1) grants the Commissioner the authority to establish a method under which a taxpayer may elect to treat a specific amount as paid or incurred for meals while traveling away from home in lieu of substantiating the actual cost of meals.

.11 Section 1.274–5(j)(3) grants the Commissioner the authority to establish a method under which a taxpayer may elect to treat a specific amount as paid or incurred for incidental expenses while traveling away from home in lieu of substantiating the actual cost of incidental expenses.

.12 This revenue procedure includes modifications to Rev. Proc. 2008–59 as follows:

(1) Sections 3.02(1)(a), 4.04(6), and 5.06 provide transition rules for the last 3 months of calendar year 2009.

(2) Section 5.02 contains revisions to the *per diem* rates for high-cost localities and for other localities for purposes of section 5.

(3) Section 5.03 contains the list of high-cost localities, and section 5.04 describes changes to the list of high-cost localities for purposes of section 5.

(4) The reference in section 6.04 to section 4.04 is deleted. Section 6.04 references taxpayers that use section 4.02 or 4.03 to determine the amount of travel expenses deemed substantiated. Taxpayers described in section 4.04 use section 4.02 or 4.03. Therefore, the reference to section 4.04 in section 6.04 is unnecessary and potentially confusing.

SECTION 3. DEFINITIONS

.01 *Per diem allowance.* The term “*per diem* allowance” means a payment under a reimbursement or other expense allowance arrangement that is:

(1) Paid for ordinary and necessary business expenses incurred, or that the payor reasonably anticipates will be incurred, by an employee for lodging, meal, and incidental expenses, or for meal and incidental expenses, for travel away from home performing services as an employee of the employer,

(2) Reasonably calculated not to exceed the amount of the expenses or the anticipated expenses, and

(3) Paid at or below the applicable federal *per diem* rate, a flat rate or stated schedule, or in accordance with any other Service-specified rate or schedule.

.02 *Federal per diem rate and federal M&IE rate.*

(1) *In general.* The federal *per diem* rate is equal to the sum of the applicable federal lodging expense rate and the applicable federal meal and incidental expense (M&IE) rate for the day and locality of travel.

(a) *CONUS rates.* The rates for localities in the continental United States (“CONUS”) are set forth in Appendix A to 41 C.F.R. ch. 301. However, in applying section 4.01, 4.02, or 4.03 of this revenue procedure, taxpayers may continue to use the CONUS rates in effect for the first 9 months of 2009 for expenses of all CONUS travel away from home that are paid or incurred during calendar year 2009 in lieu of the updated GSA rates. A taxpayer must consistently use either these rates or the updated rates for the period October 1, 2009, through December 31, 2009.

(b) *OCONUS rates*. The rates for localities outside the continental United States (“OCONUS”) are established by the Secretary of Defense (rates for non-foreign localities, including Alaska, Hawaii, Puerto Rico, the Northern Mariana Islands, and the possessions of the United States) and by the Secretary of State (rates for foreign localities), and are published in the *Per Diem* Supplement to the Standardized Regulations (Government Civilians, Foreign Areas) (updated on a monthly basis).

(c) *Internet access to the rates*. The CONUS and OCONUS rates may be found on the Internet at www.gsa.gov.

(2) *Locality of travel*. The term “locality of travel” means the locality where an employee traveling away from home performing services as an employee of an employer stops for sleep or rest.

(3) *Incidental expenses*. The term “incidental expenses” has the same meaning as in the Federal Travel Regulations, 41 C.F.R. 300–3.1 (2009). The Federal Travel Regulations currently include as incidental expenses fees and tips given to porters, baggage carriers, bellhops, hotel maids, stewards or stewardesses and others on ships, and hotel servants in foreign countries; transportation between places of lodging or business and places where meals are taken, if suitable meals can be obtained at the temporary duty site; and the mailing cost associated with filing travel vouchers and payment of employer-sponsored charge card billings.

.03 Flat rate or stated schedule.

(1) *In general*. Except as provided in section 3.03(2) of this revenue procedure, an allowance is paid at a flat rate or stated schedule if it is provided on a uniform and objective basis for the expenses described in section 3.01 of this revenue procedure. The allowance may be paid for the number of days away from home performing services as an employee or on any other basis that is consistently applied and in accordance with reasonable business practice. Thus, for example, an hourly payment to cover meal and incidental expenses paid to a pilot or flight attendant who is traveling away from home performing services as an employee is an allowance paid at a flat rate or stated schedule. Likewise, a payment based on the number of miles traveled (such as cents per mile) to cover meal and incidental expenses paid to an over-the-road truck driver who is traveling

away from home performing services as an employee is an allowance paid at a flat rate or stated schedule.

(2) *Limitation*. An allowance that is computed on a basis similar to that used in computing an employee’s wages or other compensation (such as the number of hours worked, miles traveled, or pieces produced) does not meet the business connection requirement of § 1.62–2(d), is not a *per diem* allowance, and is not paid at a flat rate or stated schedule, unless, as of December 12, 1989, (a) the allowance was identified by the payor either by making a separate payment or by specifically identifying the amount of the allowance, or (b) an allowance computed on that basis was commonly used in the industry in which the employee performed services. See § 1.62–2(d)(3)(ii).

SECTION 4. PER DIEM SUBSTANTIATION METHOD

.01 Per diem allowance. If a payor pays a *per diem* allowance in lieu of reimbursing actual lodging, meal, and incidental expenses incurred or to be incurred by an employee for travel away from home, the amount of the expenses that is deemed substantiated for each calendar day is equal to the lesser of the *per diem* allowance for that day or the amount computed at the federal *per diem* rate (see section 3.02 of this revenue procedure) for the locality of travel for that day (or partial day, see section 6.04 of this revenue procedure).

.02 Meal and incidental expenses only per diem allowance. If a payor pays a *per diem* allowance only for meal and incidental expenses in lieu of reimbursing actual meal and incidental expenses incurred or to be incurred by an employee for travel away from home, the amount of the expenses that is deemed substantiated for each calendar day is equal to the lesser of the *per diem* allowance for that day or the amount computed at the federal M&IE rate for the locality of travel for that day (or partial day). A *per diem* allowance is treated as paid only for meal and incidental expenses if (1) the payor pays the employee for actual expenses for lodging based on receipts submitted to the payor, (2) the payor provides the lodging in kind, (3) the payor pays the actual expenses for lodging directly to the provider of the lodging, (4) the payor does not have a reason-

able belief that lodging expenses were or will be incurred by the employee, or (5) the allowance is computed on a basis similar to that used in computing an employee’s wages or other compensation (such as the number of hours worked, miles traveled, or pieces produced).

.03 Optional method for meal and incidental expenses only deduction. In lieu of using actual expenses in computing the amount allowable as a deduction for ordinary and necessary meal and incidental expenses paid or incurred for travel away from home, employees and self-employed individuals who pay or incur meal expenses may use an amount computed at the federal M&IE rate for the locality of travel for each calendar day (or partial day) the employee or self-employed individual is away from home. This amount is deemed substantiated for purposes of paragraphs (b)(2) and (c) of § 1.274–5, provided the employee or self-employed individual substantiates the elements of time, place, and business purpose of the travel for that day (or partial day) in accordance with those regulations. See section 6.05(1) of this revenue procedure for rules related to the application of the limitation under § 274(n) to amounts determined under this section 4.03. See section 4.05 of this revenue procedure for a method for substantiating incidental expenses that may be used by employees or self-employed individuals who do not pay or incur meal expenses.

.04 Special rules for transportation industry.

(1) *In general*. This section 4.04 applies to (a) a payor that pays a *per diem* allowance only for meal and incidental expenses for travel away from home to an employee in the transportation industry and computes the amount under section 4.02 of this revenue procedure, or (b) an employee or self-employed individual in the transportation industry who computes the amount allowable as a deduction for meal and incidental expenses for travel away from home under section 4.03 of this revenue procedure.

(2) *Transportation industry defined*. For purposes of this section 4.04, an employee or self-employed individual is in the transportation industry only if the employee’s or self-employed individual’s work (a) is of the type that directly involves moving people or goods by airplane, barge, bus, ship, train, or truck, and

(b) regularly requires travel away from home which, during any single trip away from home, usually involves travel to localities with differing federal M&IE rates. For purposes of the preceding sentence, a payor must determine that an employee or a group of employees is in the transportation industry by using a method that is consistently applied and in accordance with reasonable business practice.

(3) *Rates.* A taxpayer described in section 4.04(1) of this revenue procedure may treat \$59 as the federal M&IE rate for any CONUS locality of travel, and \$65 as the federal M&IE rate for any OCONUS locality of travel. A payor that uses either (or both) of these special rates for an employee must use the special rate(s) for all amounts deemed substantiated under section 4.02 of this revenue procedure paid to that employee for travel away from home within CONUS and/or OCONUS, as the case may be, during the calendar year. Similarly, an employee or self-employed individual that uses either (or both) of these special rates must use the special rate(s) for all amounts deemed substantiated under section 4.03 of this revenue procedure for travel away from home within CONUS and/or OCONUS, as the case may be, during the calendar year. See section 4.04(6) of this revenue procedure for transition rules.

(4) *Periodic rule.* A payor described in section 4.04(1) of this revenue procedure may compute the amount of the employee's expenses that is deemed substantiated under section 4.02 of this revenue procedure periodically (not less frequently than monthly), rather than daily, by comparing the total *per diem* allowance paid for the period to the sum of the amounts computed either at the federal M&IE rate(s) for the localities of travel, or at the special rate described in section 4.04(3), for the days (or partial days) the employee is away from home during the period.

(5) *Examples.*

(a) *Example 1.* Taxpayer, an employee in the transportation industry, travels away from home on business within CONUS on 16 days (including partial days) during a calendar month. A payor pays Taxpayer a *per diem* allowance only for meal and incidental expenses that the payor computes using section 4.04(3) of this revenue procedure and the method of proration described in section 6.04(2) of this revenue procedure. The amount deemed substantiated under section 4.02 of this revenue procedure is equal to the lesser of the total *per diem* allowance paid for the month or \$944 (16 days at \$59 per day).

(b) *Example 2.* Taxpayer, a truck driver employee in the transportation industry, is paid a "cents-per-mile" allowance that qualifies as an allowance paid under a flat rate or stated schedule as defined in section 3.03 of this revenue procedure. Taxpayer travels away from home on business for 10 days. Based on the number of miles driven by Taxpayer, Taxpayer's employer pays an allowance of \$500 for the 10 days of business travel. Taxpayer actually drives for 8 days, and does not drive for the other 2 days Taxpayer is away from home. Taxpayer is paid under the periodic rule used for transportation industry employers and employees in accordance with section 4.04(4) of this revenue procedure. The amount deemed substantiated is the full \$500 because that amount does not exceed \$590 (ten days away from home at \$59 per day).

(6) *Transition rules.* Under the calendar-year convention provided in section 4.04(3), a taxpayer who used the federal M&IE rates during the first 9 months of calendar year 2009 to substantiate the amount of an individual's travel expenses under sections 4.02 or 4.03 of Rev. Proc. 2008-59 may not use, for that individual, the special transportation industry rates provided in this section 4.04 until January 1, 2010. Similarly, a taxpayer who used the special transportation industry rates during the first 9 months of calendar year 2009 to substantiate the amount of an individual's travel expenses may not use, for that individual, the federal M&IE rates until January 1, 2010.

.05 *Optional method for incidental expenses only deduction.* In lieu of using actual expenses in computing the amount allowable as a deduction for ordinary and necessary incidental expenses paid or incurred for travel away from home, employees and self-employed individuals who pay or incur incidental expenses but do not pay or incur meal expenses for a calendar day (or partial day) of travel away from home may use, for each calendar day (or partial day) the employee or self-employed individual is away from home, an amount computed at the rate of \$5 per day for any CONUS or OCONUS locality of travel. This amount is deemed substantiated for purposes of paragraphs (b)(2) and (c) of § 1.274-5, provided the employee or self-employed individual substantiates the elements of time, place, and business purpose of the travel for that day (or partial day) in accordance with those regulations. See section 4.03 of this revenue procedure for a method that may be used by employees or self-employed individuals who pay or incur meal ex-

penses. The method authorized by this section 4.05 may not be used by payors that use section 4.01, 4.02, or 5.01 of this revenue procedure, or by employees or self-employed individuals who use the method described in section 4.03 of this revenue procedure. See section 6.05(5) of this revenue procedure for rules related to the application of the limitation under § 274(n) to amounts determined under this section 4.05.

SECTION 5. HIGH-LOW SUBSTANTIATION METHOD

.01 *In general.* If a payor pays a *per diem* allowance in lieu of reimbursing actual lodging, meal, and incidental expenses incurred or to be incurred by an employee for travel away from home and the payor uses the high-low substantiation method described in this section 5 for travel within CONUS, the amount of the expenses that is deemed substantiated for each calendar day is equal to the lesser of the *per diem* allowance for that day or the amount computed at the rate provided in section 5.02 of this revenue procedure for the locality of travel for that day (or partial day, see section 6.04 of this revenue procedure). Except as provided in section 5.06 of this revenue procedure, this high-low substantiation method may be used in lieu of the *per diem* substantiation method provided in section 4.01 of this revenue procedure, but may not be used in lieu of the meal and incidental expenses only *per diem* substantiation method provided in section 4.02 of this revenue procedure.

.02 *Specific high-low rates.* Except as provided in section 5.06 of this revenue procedure, the *per diem* rate set forth in this section 5.02 is \$258 for travel to any "high-cost locality" specified in section 5.03 of this revenue procedure, or \$163 for travel to any other locality within CONUS. The high or low rate, as appropriate, applies as if it were the federal *per diem* rate for the locality of travel. For purposes of applying the high-low substantiation method and the § 274(n) limitation on meal expenses (see section 6.05(3) of this revenue procedure), the amount of the high and low rates that is treated as paid for meals is \$65 for a high-cost locality and \$52 for any other locality within CONUS.

.03 *High-cost localities.* The following localities have a federal *per diem* rate of

\$211 or more, and are high-cost localities for all of the calendar year or the portion of the calendar year specified in parentheses under the key city name:

| <i>Key City</i> | <i>County or other defined location</i> |
|---|---|
| Arizona | |
| Phoenix/Scottsdale (January 1-May 31) | Maricopa |
| Sedona (March 1-April 30) | City limits of Sedona |
| California | |
| Monterey | Monterey |
| Napa (October 1-November 30 and April 1-September 30) | Napa |
| San Diego | San Diego |
| San Francisco | San Francisco |
| Santa Barbara | Santa Barbara |
| Santa Monica | City limits of Santa Monica |
| South Lake Tahoe (December 1-March 31) | El Dorado |
| Colorado | |
| Aspen (December 1-April 30) | Pitkin |
| Denver/Aurora | Denver, Adams, Arapahoe, and Jefferson |
| Steamboat Springs (December 1-March 31) | Routt |
| Telluride (December 1-March 31 and June 1-September 30) | San Miguel |
| Vail (December 1-March 31) | Eagle |
| District of Columbia | |
| Washington D.C. (also the cities of Alexandria, Falls Church, and Fairfax, and the counties of Arlington and Fairfax, in Virginia; and the counties of Montgomery and Prince George's in Maryland) (See also Maryland and Virginia) | |
| Florida | |
| Fort Lauderdale (October 1-April 30) | Broward |
| Fort Walton Beach/De Funiak Springs (June 1-July 31) | Okaloosa and Walton |
| Key West | Monroe |
| Miami (January 1-March 31) | Miami-Dade |
| Naples (January 1-April 30) | Collier |
| Illinois | |
| Chicago | Cook and Lake |

| <i>Key City</i> | <i>County or other defined location</i> |
|--|---|
| <p>Maine</p> <p>Bar Harbor (July 1-August 31)</p> <p>Maryland</p> <p>Baltimore City (October 1-November 30 and March 1-September 30)</p> <p>Cambridge/St. Michaels (June 1-August 31)</p> <p>Ocean City (June 1-August 31)</p> <p>Washington, DC Metro Area</p> <p>Massachusetts</p> <p>Boston/Cambridge</p> <p>Martha's Vineyard (June 1-August 31)</p> <p>Nantucket (June 1-September 30)</p> <p>New Hampshire</p> <p>Conway (July 1-August 31)</p> <p>New York</p> <p>Floral Park/Garden City/Great Neck</p> <p>Glens Falls (July 1-August 31)</p> <p>Lake Placid (July 1-August 31)</p> <p>Manhattan (includes the boroughs of Manhattan, Brooklyn, the Bronx, Queens and Staten Island)</p> <p>Saratoga Springs/Schenectady (July 1-August 31)</p> <p>Tarrytown/White Plains/New Rochelle</p> <p>Pennsylvania</p> <p>Hershey (June 1-August 31)</p> <p>Philadelphia</p> <p>Rhode Island</p> <p>Jamestown/Middletown/Newport (October 1-October 31 and May 1-September 30)</p> <p>Utah</p> <p>Park City (January 1-March 31)</p> <p>Virginia</p> <p>Washington, DC Metro Area</p> <p>Washington</p> <p>Seattle</p> | <p>Hancock</p> <p>Baltimore City</p> <p>Dorchester and Talbot</p> <p>Worcester</p> <p>Montgomery and Prince George's</p> <p>Suffolk, City of Cambridge</p> <p>Dukes</p> <p>Nantucket</p> <p>Carroll</p> <p>Nassau</p> <p>Warren</p> <p>Essex</p> <p>Bronx, Kings, New York, Queens, Richmond</p> <p>Saratoga and Schenectady</p> <p>Westchester</p> <p>City of Hershey</p> <p>Philadelphia</p> <p>Newport</p> <p>Summit</p> <p>Cities of Alexandria, Fairfax, and Falls Church; counties of Arlington and Fairfax</p> <p>King</p> |

.04 *Changes in high-cost localities.* The list of high-cost localities in section 5.03 of this revenue procedure differs from the list of high-cost localities in section 5.03 of Rev. Proc. 2008–59 (changes listed by key cities).

(1) The following localities have been added to the list of high-cost localities: Monterey, California; Denver/Aurora, Colorado; Bar Harbor, Maine; Conway, New Hampshire; Glens Falls, New York; Lake Placid, New York; and Hershey, Pennsylvania.

(2) The portion of the year for which the following are high-cost localities has been changed: Phoenix/Scottsdale, Arizona; Napa, California; San Diego, California; Telluride, Colorado; Vail, Colorado; Miami, Florida; Naples, Florida; Baltimore City, Maryland; Cambridge/St. Michaels, Maryland; Ocean City, Maryland; and Jamestown/Middletown/Newport, Rhode Island.

(3) The following localities have been removed from the list of high-cost localities: Crested Butte/Gunnison, Colorado; Silverthorne/Breckenridge, Colorado; and Palm Beach, Florida.

(4) The following localities have been redefined: Floral Park/Garden City/Great Neck, New York no longer includes Glen Gove and Roslyn; Tarrytown/White Plains/New Rochelle, New York no longer includes Yonkers.

.05 *Specific limitation.*

(1) Except as provided in section 5.05(2) of this revenue procedure, a payor that uses the high-low substantiation method for an employee must use that method for all amounts paid to that employee for travel away from home within CONUS during the calendar year. See section 5.06 of this revenue procedure for transition rules.

(2) For an employee described in section 5.05(1) of this revenue procedure, the payor may reimburse actual expenses or use the meal and incidental expenses only *per diem* substantiation method described in section 4.02 of this revenue procedure for any travel away from home, and may use the *per diem* substantiation method de-

scribed in section 4.01 of this revenue procedure for any OCONUS travel away from home.

.06 *Transition rules.* A payor who used the substantiation method of section 4.01 of Rev. Proc. 2008–59 for an employee during the first 9 months of calendar year 2009 may not use the high-low substantiation method in section 5 of this revenue procedure for that employee until January 1, 2010. A payor who used the high-low substantiation method of section 5 of Rev. Proc. 2008–59 for an employee during the first 9 months of calendar year 2009 must continue to use the high-low substantiation method for the remainder of calendar year 2009 for that employee. A payor described in the previous sentence may use the rates and high-cost localities published in section 5 of Rev. Proc. 2008–59, in lieu of the updated rates and high-cost localities provided in section 5 of this revenue procedure, for travel on or after October 1, 2009, and before January 1, 2010, if those rates and localities are used consistently during this period for all employees reimbursed under this method.

SECTION 6. LIMITATIONS AND SPECIAL RULES

.01 *In general.* The federal *per diem* rate and the federal M&IE rate described in section 3.02 of this revenue procedure for the locality of travel apply in the same manner as they apply under the Federal Travel Regulations, 41 C.F.R. Part 301–11 (2009), except as provided in sections 6.02 through 6.04 of this revenue procedure.

.02 *Federal per diem rate.* A receipt for lodging expenses is not required in determining the amount of expenses deemed substantiated under section 4.01 or 5.01 of this revenue procedure. See section 7.01 of this revenue procedure for the requirement that the employee substantiate the time, place, and business purpose of the expense.

.03 *Federal per diem or M&IE rate.* A payor is not required to reduce the federal *per diem* rate or the federal M&IE rate for the locality of travel for meals provided in

kind, provided the payor has a reasonable belief that the employee incurred or will incur meal and incidental expenses during each day of travel.

.04 *Proration of the federal per diem or M&IE rate.* Under the Federal Travel Regulations, in determining the federal *per diem* rate or the federal M&IE rate for the locality of travel, the full applicable federal M&IE rate is available for a full day of travel from 12:01 a.m. to 12:00 midnight. The method described in section 6.04(1) of this revenue procedure must be used for purposes of determining the amount deemed substantiated under section 4.03 or 4.05 of this revenue procedure for partial days of travel away from home. For purposes of determining the amount deemed substantiated under section 4.01, 4.02, or 5 of this revenue procedure for partial days of travel away from home, either of the following methods may be used to prorate the federal M&IE rate to determine the federal *per diem* rate or the federal M&IE rate for the partial days of travel:

(1) The rate may be prorated using the method prescribed by the Federal Travel Regulations. Currently the Federal Travel Regulations allow three-fourths of the applicable federal M&IE rate for each partial day during which an employee or self-employed individual is traveling away from home performing services as an employee or self-employed individual. The same ratio may be applied to prorate the allowance for incidental expenses described in section 4.05 of this revenue procedure; or

(2) The rate may be prorated using any method that is consistently applied and in accordance with reasonable business practice. For example, if an employee travels away from home from 9 a.m. one day to 5 p.m. the next day, a method of proration that results in an amount equal to two times the federal M&IE rate is treated as being in accordance with reasonable business practice (even though the Federal Travel Regulations would allow only one and a half times the federal M&IE rate).

.05 *Application of the appropriate § 274(n) limitation on meal expenses.* Except as provided in section 6.05(5), all or

part of the amount of an expense deemed substantiated under this revenue procedure is subject to the appropriate limitation under § 274(n) (see section 2.02 of this revenue procedure) on the deductibility of food and beverage expenses.

(1) If an amount for meal and incidental expenses is computed under section 4.03 of this revenue procedure, a taxpayer must treat that amount as an expense for food and beverages.

(2) If a *per diem* allowance is paid only for meal and incidental expenses, a payor must treat an amount equal to the lesser of the allowance or the federal M&IE rate for the locality of travel for each day (or partial day, see section 6.04 of this revenue procedure) as an expense for food and beverages.

(3) If a *per diem* allowance is paid for lodging, meal, and incidental expenses for each calendar day (or partial day) an employee is away from home at a rate equal to or in excess of the federal *per diem* rate for the locality of travel, a payor must treat an amount equal to the federal M&IE rate for the locality of travel for each calendar day (or partial day) as an expense for food or beverages.

(4) If a *per diem* allowance is paid for lodging, meal, and incidental expenses for each calendar day (or partial day) an employee is away from home at a rate less than the federal *per diem* rate for the locality of travel, a payor must:

(a) Treat an amount equal to the federal M&IE rate for the locality of travel for each calendar day (or partial day) or, if less, the amount of the allowance, as an expense for food or beverages; or

(b) Treat an amount equal to 40 percent of the allowance as an expense for food or beverages.

(5) If an amount for incidental expenses is computed under section 4.05 of this revenue procedure, none of the amount is subject to limitation under § 274(n).

.06 *No double reimbursement or deduction.* If a payor pays a *per diem* allowance in lieu of reimbursing actual lodging, meal, and incidental expenses, or meal and incidental expenses, in accordance with section 4 or 5 of this revenue procedure, and the amount is treated as paid under an accountable plan, any additional payment for those expenses is treated as paid under a nonaccountable plan, is included in

an employee's gross income, is reported as wages or other compensation on the employee's Form W-2, and is subject to withholding and payment of employment taxes. Similarly, if an employee or self-employed individual computes the amount allowable as a deduction for meal and incidental expenses for travel away from home in accordance with section 4.03 or 4.04 of this revenue procedure, no other deduction is allowed to the employee or self-employed individual for those expenses. For example, assume an employee receives a *per diem* allowance from a payor for lodging, meal, and incidental expenses, incurred while traveling away from home and the amount is treated as paid under an accountable plan. During that trip, the employee pays for dinner for the employee and two business associates. The payor reimburses as a business entertainment meal expense the meal expense for the employee and the two business associates. Because the payor also pays a *per diem* allowance to cover the cost of the employee's meals, the amount paid for the employee's portion of the business entertainment meal expense is treated as paid under a nonaccountable plan, is reported as wages or other compensation on the employee's Form W-2, and is subject to withholding and payment of employment taxes.

.07 *Related parties.* Sections 4.01 and 5 of this revenue procedure do not apply if a payor and an employee are related within the meaning of § 267(b), but for this purpose the percentage of ownership interest referred to in § 267(b)(2) is 10 percent.

SECTION 7. APPLICATION

.01 An employee satisfies the adequate accounting and substantiation requirements of § 1.274-5(c) and (f)(4) and § 1.274-5T(c) if—

(1) The employee uses this revenue procedure to substantiate to a payor the amount of the employee's travel expenses, and

(2) Within a reasonable period of time, the employee also substantiates to the payor the elements of time, place, and business purpose of the travel in accordance with § 1.274-5T(b)(2) and (c) and § 1.274-5(c) (other than § 1.274-5(c)(2)(iii)(A)).

.02 An arrangement providing *per diem* allowances is treated as satisfying the requirement of § 1.62-2(f)(2) of returning amounts in excess of expenses if an employee is required to return within a reasonable period of time (as defined in § 1.62-2(g)) any portion of the allowance that relates to days of travel not substantiated, even though the arrangement does not require the employee to return the portion of the allowance that relates to days of travel substantiated and that exceeds the amount of the employee's expenses deemed substantiated. For example, assume a payor provides an employee an advance *per diem* allowance for meal and incidental expenses of \$250, based on an anticipated 5 days of business travel at \$50 per day to a locality for which the federal M&IE rate is \$46, and the employee substantiates 3 full days of business travel. The requirement to return excess amounts is treated as satisfied if the employee is required to return within a reasonable period of time (as defined in § 1.62-2(g)) the portion of the allowance that is attributable to the 2 unsubstantiated days of travel (\$100), even though the employee is not required to return the portion of the allowance (\$12) that exceeds the amount of the employee's expenses deemed substantiated under section 4.02 of this revenue procedure (\$138) for the 3 substantiated days of travel. However, the \$12 excess portion of the allowance is treated as paid under a nonaccountable plan as discussed in section 7.04 of this revenue procedure.

.03 An employee is not required to include in gross income the portion of a *per diem* allowance received from a payor that is less than or equal to the amount deemed substantiated under the rules provided in section 4 or 5 of this revenue procedure if the employee substantiates the business travel expenses covered by the *per diem* allowance in accordance with section 7.01 of this revenue procedure. See § 1.274-5T(f)(2)(i). If the remaining requirements for an accountable plan provided in § 1.62-2 are satisfied, that portion of the allowance is treated as paid under an accountable plan, is not reported as wages or other compensation on the employee's Form W-2, and is exempt from the withholding and payment of employment taxes. See § 1.62-2(c)(2) and (c)(4).

.04 An employee is required to include in gross income only the portion of the *per*

diem allowance received from a payor that exceeds the amount deemed substantiated under the rules provided in section 4 or 5 of this revenue procedure if the employee substantiates the business travel expenses covered by the *per diem* allowance in accordance with section 7.01 of this revenue procedure. See § 1.274–5T(f)(2)(ii). In addition, the excess portion of the allowance is treated as paid under a nonaccountable plan, is reported as wages or other compensation on the employee's Form W–2, and is subject to withholding and payment of employment taxes. See § 1.62–2(c)(3)(ii), (c)(5), and (h)(2)(i)(B).

.05 If the amount of the expenses that is deemed substantiated under the rules provided in section 4.01, 4.02, or 5 of this revenue procedure is less than the amount of an employee's business expenses for travel away from home, an employee may claim an itemized deduction for the amount by which the business travel expenses exceed the amount that is deemed substantiated, provided the employee substantiates all the business travel expenses (not just the excess over the federal *per diem* rate), includes on Form 2106, "Employee Business Expenses," the deemed substantiated portion of the *per diem* allowance received from the payor, and includes in gross income the portion (if any) of the *per diem* allowance received from the payor that exceeds the amount deemed substantiated. See § 1.274–5T(f)(2)(iii). However, for purposes of claiming this itemized deduction for meal and incidental expenses, substantiation of the amount of the expenses is not required if the employee is claiming a deduction that is equal to or less than the amount computed under section 4.03 of this revenue procedure minus the amount deemed substantiated under sections 4.02 and 7.01 of this revenue procedure. The itemized deduction is subject to the appropriate limitation (see section 2.02 of this revenue procedure) on meal and entertainment expenses in § 274(n) and the 2-percent floor on miscellaneous itemized deductions in § 67.

.06 An employee who pays or incurs meal expenses and does not receive a *per diem* allowance for meal and incidental expenses may deduct an amount computed under section 4.03 of this revenue procedure only as an itemized deduction. This itemized deduction is subject to the appropriate limitation on meal and entertain-

ment expenses in § 274(n) and the 2-percent floor on miscellaneous itemized deductions in § 67. See section 7.07 of this revenue procedure for the treatment of an employee who does not pay or incur amounts for meal expenses and does not receive a *per diem* allowance for incidental expenses.

.07 An employee who does not pay or incur amounts for meal expenses and does not receive a *per diem* allowance for incidental expenses may deduct an amount computed under section 4.05 of this revenue procedure only as an itemized deduction. This itemized deduction is subject to the 2-percent floor on miscellaneous itemized deductions in § 67. See section 7.06 of this revenue procedure for the treatment of an employee who pays or incurs amounts for meal expenses and does not receive a *per diem* allowance for meal and incidental expenses.

.08 A self-employed individual who pays or incurs meal expenses for a calendar day (or partial day) of travel away from home may deduct an amount computed under section 4.03 of this revenue procedure in determining adjusted gross income under § 62(a)(1). This deduction is subject to the appropriate limitation on meal and entertainment expenses in § 274(n).

.09 A self-employed individual who does not pay or incur meal expenses for a calendar day (or partial day) of travel away from home may deduct an amount computed under section 4.05 of this revenue procedure in determining adjusted gross income under § 62(a)(1).

SECTION 8. WITHHOLDING AND PAYMENT OF EMPLOYMENT TAXES

.01 The portion of a *per diem* allowance, if any, that relates to the days of business travel substantiated and that exceeds the amount deemed substantiated for those days under section 4.01, 4.02, or 5 of this revenue procedure is treated as paid under a nonaccountable plan and is subject to withholding and payment of employment taxes. See § 1.62–2(h)(2)(i)(B).

.02 In the case of a *per diem* allowance paid as a reimbursement, the excess described in section 8.01 of this revenue procedure is subject to withholding and payment of employment taxes in the payroll period in which a payor reimburses the ex-

penses for the days of travel substantiated. See § 1.62–2(h)(2)(i)(B)(2).

.03 In the case of a *per diem* allowance paid as an advance, the excess described in section 8.01 of this revenue procedure is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the days of travel for which the advance was paid are substantiated. See § 1.62–2(h)(2)(i)(B)(3). If an employee does not substantiate some or all of the days of travel for which the advance was paid within a reasonable period of time or does not return the portion of the allowance that relates to those days within a reasonable period of time, the portion of the allowance that relates to those days is subject to withholding and payment of employment taxes no later than the first payroll period following the end of the reasonable period. See § 1.62–2(h)(2)(i)(A).

.04 In the case of a *per diem* allowance only for meal and incidental expenses for travel away from home paid to an employee in the transportation industry by a payor that uses the rule in section 4.04(4) of this revenue procedure, the excess of the *per diem* allowance paid for the period over the amount deemed substantiated for the period under section 4.02 of this revenue procedure (after applying section 4.04(4) of this revenue procedure), is subject to withholding and payment of employment taxes no later than the first payroll period following the payroll period in which the excess is computed. See § 1.62–2(h)(2)(i)(B)(4).

.05 For example, assume that an employer pays an employee a *per diem* allowance under an arrangement that otherwise meets the requirements of an accountable plan to cover business expenses for meals and lodging for travel away from home at a rate of 120 percent of the federal *per diem* rate for the localities to which the employee travels. The employer does not require the employee to return the 20 percent by which the reimbursement for those expenses exceeds the federal *per diem* rate. The employee substantiates 6 days of travel away from home: 2 days in a locality in which the federal *per diem* rate is \$160 and 4 days in a locality in which the federal *per diem* rate is \$120. The employer reimburses the employee \$960 for the 6 days of travel away from home (2 x (120% x \$160) + 4

x (120% x \$120)), and does not require the employee to return the excess payment of \$160 (2 days x \$32 (\$192-\$160) + 4 days x \$24 (\$144-\$120)). For the payroll period in which the employer reimburses the expenses, the employer must withhold and pay employment taxes on \$160. See section 8.02 of this revenue procedure.

.06 All payments to an employee under a *per diem* allowance arrangement are treated as paid under a nonaccountable plan if the reimbursement arrangement evidences a pattern of abuse. An arrangement evidences a pattern of abuse if, for example, it has no process to determine when an allowance exceeds the amount that may be deemed substantiated and the arrangement routinely pays allowances in excess of the amount that may be deemed substantiated without requiring actual substantiation or repayment of the excess

amount or treating the excess allowances as wages for employment tax purposes. See § 62(c), § 1.62-2(k), and Rev. Rul. 2006-56, 2006-2 C.B. 874. Thus, these payments are included in the employee's gross income, are reported as wages or other compensation on the employee's Form W-2, and are subject to withholding and payment of employment taxes. See §§ 1.62-2(c)(3), (c)(5), and (h)(2).

SECTION 9. EFFECTIVE DATE

This revenue procedure is effective for *per diem* allowances for lodging, meal and incidental expenses, or for meal and incidental expenses only that are paid to an employee on or after October 1, 2009, for travel away from home on or after October 1, 2009. For purposes of computing the amount allowable as a deduction for travel

away from home, this revenue procedure is effective for meal and incidental expenses or for incidental expenses only paid or incurred on or after October 1, 2009.

SECTION 10. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2008-59 is superseded.

DRAFTING INFORMATION

The principal author of this revenue procedure is Karla M. Meola of the Office of Associate Chief Counsel (Income Tax and Accounting). For further information regarding this revenue procedure, contact Ms. Meola at (202) 622-4930 (not a toll-free call).

Part IV. Items of General Interest

Notice of Proposed Rulemaking

Damages Received on Account of Personal Physical Injuries or Physical Sickness

REG-127270-06

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to the exclusion from gross income for amounts received on account of personal physical injuries or physical sickness. The proposed regulations reflect amendments under the Small Business Job Protection Act of 1996. The proposed regulations also delete the requirement that to qualify for exclusion from gross income, damages received from a legal suit, action, or settlement agreement must be based upon “tort or tort type rights.” The proposed regulations affect taxpayers receiving damages on account of personal physical injuries or physical sickness and taxpayers paying these damages.

DATES: Written (paper or electronic) comments must be received by December 14, 2009.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-127270-06), room 5203, Internal Revenue Service, Post Office Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG-127270-06), Courier’s Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at www.regulations.gov (IRS REG-127270-06).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Sheldon A. Iskow, (202) 622-4920 (not a toll-free number); concerning the submission

of comments and/or requests for a public hearing, Richard Hurst at Richard.A.Hurst@irs.counsel.treas.gov.

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) to reflect amendments made to section 104(a)(2) of the Internal Revenue Code (Code) by section 1605(a) and (b) of the Small Business Job Protection Act of 1996, Public Law 104-188, (110 Stat. 1838 (the 1996 Act)), and to delete the “tort or tort type rights” test under §1.104-1(c) of the Income Tax Regulations.

As amended, section 104(a)(2) excludes from gross income the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness. These proposed regulations conform the regulations to these statutory amendments and clarify the changes for taxpayers and practitioners.

1. The 1996 Act Amendments

Section 1605(a) of the 1996 Act amended section 104(a)(2) to provide expressly that punitive damages do not qualify for the income exclusion. The amendment was a response to divergent court opinions, some holding that punitive damages are received “on account of” a personal injury. See H.R. Conf. Rept. 104-737 (1996) at 301. The amendment is consistent with *O’Gilvie v. United States*, 519 U.S. 79 (1996), holding that punitive damages are not compensation for personal injuries and do not satisfy the “on account of” test under section 104(a)(2). Section 1605(a) also amended section 104(a)(2) to provide that the income exclusion generally is limited to amounts received on account of personal “physical” injuries or “physical” sickness. Section 1605(b) of the 1996 Act further amended section 104(a) to provide that, for purposes of section 104(a)(2), even though emotional distress is not considered a physical

injury or a physical sickness, damages not in excess of the amount paid for “medical care” (described in section 213(d)(1)(A) or (B)) for emotional distress are excluded from income.

The proposed regulations reflect these statutory amendments. The proposed regulations also provide that a taxpayer may exclude damages received for emotional distress “attributable” to a physical injury or physical sickness. See H.R. Conf. Rept. 104-737 (1996) at 301.

2. The Tort Type Rights Test

The proposed regulations also eliminate the requirement that “personal injuries or sickness” be “based upon tort or tort type rights.” That requirement in §1.104-1(c) was intended to ensure that only damages compensating for torts and similar personal injuries qualify for exclusion under section 104(a)(2). In *United States v. Burke*, 504 U.S. 229 (1992), the Supreme Court interpreted the tort type rights test as limiting the section 104(a)(2) exclusion to damages for personal injuries for which the full range of tort-type remedies is available. The Court held that section 104(a)(2) did not apply to an award of back pay under the pre-1991 version of Title VII of the 1964 Civil Rights Act because the damages awarded under the statute provided only a narrow remedy and thus did not compensate for a tort type injury. The Burke interpretation precluded section 104(a)(2) treatment for similar personal injuries redressed by “no-fault” statutes that do not provide traditional tort-type remedies. Many critics thought the Burke remedies test was too restrictive.

Later legislative and judicial developments eliminated the need to base the section 104(a)(2) exclusion on tort and remedies concepts. First, *Commissioner v. Schleier*, 515 U.S. 323 (1995), interpreted the statutory “on account of” test as excluding only damages directly linked to “personal” injuries or sickness. Second, the 1996 Act restricts the exclusion to damages for “personal physical” injuries or “physical sickness.”

Accordingly, under the proposed regulations, damages for physical injuries may qualify for the section 104(a)(2) exclusion even though the injury giving rise to the

damages is not defined as a tort under state or common law. Nor does the section 104(a)(2) exclusion depend on the scope of remedies available under state or common law. In effect, the regulations reverse the result in *Burke* by allowing the exclusion for damages awarded under no-fault statutes.

Proposed Effective/Applicability Date

These regulations are proposed to apply to damages paid pursuant to a written binding agreement, court decree, or mediation award entered into or issued after September 13, 1995, and received after the date these regulations are published as final regulations in the **Federal Register**. However, taxpayers may apply these proposed regulations to amounts paid pursuant to a written binding agreement, court decree, or mediation award entered into or issued after September 13, 1995, and received after August 20, 1996. If applying the proposed regulations to damages received after August 20, 1996, results in an overpayment of tax, the taxpayer may file a claim for refund within the period of limitations under section 6511.

Notwithstanding the date these regulations are proposed to become effective, the 1996 Act amendments to section 104(a)(2), including the amendment restricting the exclusion to amounts received on account of personal physical injuries or physical sickness, are effective for amounts received after August 20, 1996, except for any amount received under a written binding agreement, court decree, or mediation award in effect on (or issued on or before) September 13, 1995. Since the 1996 Act amendments, courts have applied the statutory effective date in holding that amounts received on account of nonphysical injuries are not excludable. *Hennessey v. Commissioner*, T.C. Memo 2009-132; *Green v. Commissioner*, T.C. Memo 2007-39. These regulations propose to conform existing regulations to amended section 104(a)(2). To the extent that existing regulations conflict with amended section 104(a)(2), the statute controls. See *Murphy v. Internal Revenue Service*, 493 F.3d 170, 176 n* (D.C. Cir. 2007).

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (either a signed paper original with eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department specifically request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Sheldon A. Iskow of the Office of Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and Treasury Department participated in their development.

* * * * *

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:
Authority: 26 U.S.C. 7805 * * *

Par. 2. In §1.104-1, paragraph (c) is revised to read as follows:

§1.104-1 Compensation for injuries or sickness.

* * * * *

(c) *Damages received on account of personal physical injuries or physical sickness*—(1) *In general.* Section 104(a)(2) excludes from gross income the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness. Emotional distress is not considered a physical injury or physical sickness. However, damages for emotional distress attributable to a physical injury or physical sickness are excluded from income under section 104(a)(2). Section 104(a)(2) also excludes damages not in excess of the amount paid for medical care (described in section 213(d)(1)(A) or (B)) for emotional distress. For purposes of this paragraph (c), the term *damages* means an amount received (other than workers' compensation) through prosecution of a legal suit or action, or through a settlement agreement entered into in lieu of prosecution.

(2) *Cause of action and remedies.* The section 104(a)(2) exclusion may apply to damages recovered for a physical personal injury or sickness under a statute, even if that statute does not provide for a broad range of remedies. The injury need not be defined as a tort under state or common law.

(3) *Effective/applicability date.* This paragraph (c) applies to damages paid pursuant to a written binding agreement, court decree, or mediation award entered into or issued after September 13, 1995, and received after the date these regulations are published as final regulations in the **Federal Register**. Taxpayers also may apply these proposed regulations to damages paid pursuant to a written binding agreement, court decree, or mediation award entered into or issued after September 13, 1995, and received after August 20, 1996. If applying these proposed regulations to

damages received after August 20, 1996, results in an overpayment of tax, the taxpayer may file a claim for refund before the period of limitations under section 6511 expires. Notwithstanding the date these regulations are proposed to become effective, the statutory amendments to section 104(a) under section 1605 of the Small Business Job Protection Act of 1996, Public Law 104-188, (110 Stat. 1838), are effective for amounts received after August 20, 1996, except for any amount received under a written binding agreement, court decree, or mediation award in effect on (or issued on or before) September 13, 1995.

* * * * *

Linda E. Stiff,
*Deputy Commissioner for
Services and Enforcement.*

(Filed by the Office of the Federal Register on September 14, 2009, 8:45 a.m., and published in the issue of the Federal Register for September 15, 2009, 74 F.R. 47152)

Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations

Disregarded Entities and Excise Taxes

REG-116614-08

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In the this issue of the Bulletin, the IRS is issuing temporary regulations (T.D. 9462) clarifying that a single-owner eligible entity that is disregarded as an entity separate from its owner for any purpose, but regarded as a separate entity for certain excise tax purposes, is treated as a corporation for tax administration purposes related to those excise taxes. Those regulations also make conforming changes to the tax liability rule for disregarded entities and the treatment of entity rule for disregarded entities with respect to employment taxes. The regulations affect disregarded entities in general and, in particular, disregarded entities that pay or pay over

certain federal excise taxes or that are required to be registered by the IRS. The text of those temporary regulations also serves as the text of these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by December 14, 2009.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-116614-08), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG-116614-08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-116614-08).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Michael H. Beker, (202) 622-3070; concerning the submissions of comments and requests for a public hearing, Richard Hurst, (202) 622-2949 (TDD telephone) (not toll-free numbers) and his e-mail address is Richard.A.Hurst@irscounsel.treas.gov.

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Temporary regulations in this issue of the Bulletin amend 26 CFR part 301. The temporary regulations clarify that a single-owner eligible entity that is disregarded as an entity separate from its owner for any purpose, but regarded as a separate entity for certain excise tax purposes, is treated as a corporation for tax administrative purposes related to those excise taxes (that is, excise taxes reported on Form 720, "*Quarterly Federal Excise Tax Return*;" Form 730, "*Monthly Tax Return for Wagers*;" Form 2290, "*Heavy Highway Vehicle Use Tax Return*;" and Form 11-C, "*Occupation Tax and Registration Return for Wagering*;" excise tax refunds or payments claimed on Form 8849, "*Claim for Refund of Excise Taxes*;" and excise tax registrations on Form 637, "*Application for Registration (For Certain*

Excise Tax Activities). The temporary regulations also make conforming changes to the tax liability rule for disregarded entities in §301.7701-2(c)(2)(iii) and the treatment of entity rule for disregarded entities with respect to employment taxes in §301.7701-2(c)(2)(iv)(B). The text of those temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the temporary regulations and these proposed regulations.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department specifically request comments on the clarity of the proposed rules and how they may be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested by any person who timely submits comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Michael H. Beker, Office of the

Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

* * * * *

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 301.7701-2 is amended by:

1. Revising paragraphs (c)(2)(iii) and (c)(2)(iv)(B).

2. Redesignating paragraph (c)(2)(v)(B) as paragraph (c)(2)(v)(C) and adding new paragraph (c)(2)(v)(B).

3. In newly-designated paragraph (c)(2)(v)(C), *Example (iv)* is added.

4. Revising paragraphs (e)(2), (e)(5) and (e)(6).

The additions and revisions read as follows:

§301.7701-2 Business entities; definitions.

* * * * *

(c) * * *

(2) * * *

(iii) [The text of this proposed amendment to §301.7701-2(c)(2)(iii) is the same as the text of §301.7701-2T(c)(2)(iii) published elsewhere in this issue of the Bulletin].

(iv) * * *

(B) [The text of this proposed amendment to §301.7701-2(c)(2)(iv)(B) is the same as the text of §301.7701-2T(c)(2)(iv)(B) published elsewhere in this issue of the Bulletin].

* * * * *

(v) * * *

(B) [The text of this proposed amendment to §301.7701-2(c)(2)(v)(B) is the same as the text of §301.7701-2T(c)(2)(v)(B) published elsewhere in this issue of the Bulletin].

(C) * * * (iv) [The text of this proposed amendment to §301.7701-2(c)(2)(v)(C) *Example (iv)* is the same as the text of §301.7701-2T(c)(2)(v)(C) *Example (iv)* published elsewhere in this issue of the Bulletin].

* * * * *

(e) * * *

(2) [The text of this proposed amendment to §301.7701-2(e)(2) is the same as the text of §301.7701-2T(e)(2) published elsewhere in this issue of the Bulletin].

* * * * *

(5) [The text of this proposed amendment to §301.7701-2(e)(5) is the same as the text of §301.7701-2T(e)(5) published elsewhere in this issue of the Bulletin].

(6) [The text of this proposed amendment to §301.7701-2(e)(6) is the same as the text of §301.7701-2T(e)(6) published elsewhere in this issue of the Bulletin].

* * * * *

L. E. Stiff,
Deputy Commissioner for
Services and Enforcement.

(Filed by the Office of the Federal Register on September 10, 2009, 11:15 a.m., and published in the issue of the Federal Register for September 14, 2009, 74 F.R. 46957)

Corrections to Rev. Rul. 2009-22 and Rev. Rul. 2009-29

Announcement 2009-74

This document contains corrections to both the August AFR (**Rev. Rul. 2009-22**) and the September AFR (**Rev. Rul. 2009-29**) which contained an inaccurate date in the Note in Table 4.

The Note in Table 4 in the August AFR (Rev. Rul. 2009-22) incorrectly read:

“Note: Under Section 42(b)(2), the applicable percentage for non-federally subsidized new buildings placed in service after **August 30, 2008**, and before December 31, 2013, shall not be less than 9%.”

The Note in Table 4 in the September AFR (Rev. Rul. 2009-29) incorrectly read:

“Note: Under Section 42(b)(2), the applicable percentage for non-federally subsidized new buildings placed in service after **September 30, 2008**, and before December 31, 2013, shall not be less than 9%.”

The Note in Table 4 should have read (in both revenue procedures):

“Note: Under Section 42(b)(2), the applicable percentage for non-federally subsidized new buildings placed in service after **July 30, 2008** and before December 31, 2013 shall not be less than 9%.”

Announcement of Disciplinary Sanctions From the Office of Professional Responsibility

Announcement 2009-75

The Office of Professional Responsibility (OPR) announces recent disciplinary sanctions involving attorneys, certified public accountants, enrolled agents, enrolled actuaries, enrolled retirement plan agents, and appraisers. These individuals are subject to the regulations governing practice before the Internal Revenue Ser-

vice (IRS), which are set out in Title 31, Code of Federal Regulations, Part 10, and which are published in pamphlet form as Treasury Department Circular No. 230. The regulations prescribe the duties and restrictions relating to such practice and prescribe the disciplinary sanctions for violating the regulations.

The disciplinary sanctions to be imposed for violation of the regulations are:

Disbarred from practice before the IRS—An individual who is disbarred is not eligible to represent taxpayers before the IRS.

Suspended from practice before the IRS—An individual who is suspended is

not eligible to represent taxpayers before the IRS during the term of the suspension.

Censured in practice before the IRS—Censure is a public reprimand. Unlike disbarment or suspension, censure does not affect an individual's eligibility to represent taxpayers before the IRS, but OPR may subject the individual's future representations to conditions designed to promote high standards of conduct.

Monetary penalty—A monetary penalty may be imposed on an individual who engages in conduct subject to sanction or on an employer, firm, or entity if the individual was acting on its behalf and if it knew, or reasonably should have known, of the individual's conduct.

Disqualification of appraiser—An appraiser who is disqualified is barred from presenting evidence or testimony in any administrative proceeding before the Department of the Treasury or the IRS.

Under the regulations, attorneys, certified public accountants, enrolled agents, enrolled actuaries, and enrolled retirement plan agents may not assist, or accept assistance from, individuals who are suspended or disbarred with respect to matters constituting practice (*i.e.*, representation) before the IRS, and they may not aid or abet suspended or disbarred individuals to practice before the IRS.

Disciplinary sanctions are described in these terms:

Disbarred by decision after hearing, Suspended by decision after hearing, Censured by decision after hearing, Monetary penalty imposed after hearing, and Disqualified after hearing—An administrative law judge (ALJ) conducted an evidentiary hearing upon OPR's complaint alleging violation of the regulations

and issued a decision imposing one of these sanctions. After 30 days from the issuance of the decision, in the absence of an appeal, the ALJ's decision became the final agency decision.

Disbarred by default decision, Suspended by default decision, Censured by default decision, Monetary penalty imposed by default decision, and Disqualified by default decision—An ALJ, after finding that no answer to OPR's complaint had been filed, granted OPR's motion for a default judgment and issued a decision imposing one of these sanctions.

Disbarment by decision on appeal, Suspended by decision on appeal, Censured by decision on appeal, Monetary penalty imposed by decision on appeal, and Disqualified by decision on appeal—The decision of the ALJ was appealed to the agency appeal authority, acting as the delegate of the Secretary of the Treasury, and the appeal authority issued a decision imposing one of these sanctions.

Disbarred by consent, Suspended by consent, Censured by consent, Monetary penalty imposed by consent, and Disqualified by consent—In lieu of a disciplinary proceeding being instituted or continued, an individual offered a consent to one of these sanctions and OPR accepted the offer. Typically, an offer of consent will provide for: suspension for an indefinite term; conditions that the individual must observe during the suspension; and the individual's opportunity, after a stated number of months, to file with OPR a petition for reinstatement affirming compliance with the terms of the consent and affirming current eligibility to practice (*i.e.*, an active professional

license or active enrollment status). An enrolled agent or an enrolled retirement plan agent may also offer to resign in order to avoid a disciplinary proceeding.

Suspended by decision in expedited proceeding, Suspended by default decision in expedited proceeding, Suspended by consent in expedited proceeding—OPR instituted an expedited proceeding for suspension (based on certain limited grounds, including loss of a professional license and criminal convictions).

OPR has authority to disclose the grounds for disciplinary sanctions in these situations: (1) an ALJ or the Secretary's delegate on appeal has issued a decision on or after September 26, 2007, which was the effective date of amendments to the regulations that permit making such decisions publicly available; (2) the individual has settled a disciplinary case by signing OPR's "consent to sanction" form, which requires consenting individuals to admit to one or more violations of the regulations and to consent to the disclosure of the individual's own return information related to the admitted violations (for example, failure to file Federal income tax returns); or (3) OPR has issued a decision in an expedited proceeding for suspension.

Announcements of disciplinary sanctions appear in the Internal Revenue Bulletin at the earliest practicable date. The sanctions announced below are alphabetized first by the names of states and second by the last names of individuals. Unless otherwise indicated, section numbers (*e.g.*, § 10.51) refer to the regulations.

| City & State | Name | Professional Designation | Disciplinary Sanction | Effective Date(s) |
|--|--------------------|--------------------------|---|------------------------------------|
| California | | | | |
| Encinitas (erroneously listed as San Francisco in IRB 2009–38) | Miller, Gregory R. | CPA | Suspended by consent for admitted violations of §§ 10.22 & 10.51 (improperly advised a client regarding the reporting of deferred compensation) | Indefinite from September 22, 2008 |

| City & State | Name | Professional Designation | Disciplinary Sanction | Effective Date(s) |
|----------------------|--------------------------|--------------------------|---|------------------------------------|
| Florida | | | | |
| Miami | Benito, Daniel A. | Attorney | Suspended by decision in expedited proceeding under § 10.82 (suspension of attorney license) | Indefinite from September 21, 2009 |
| Highland Beach | Quagliata, Salvatore | Attorney | Suspended by default decision in expedited proceeding under § 10.82 (attorney disbarment in New York) | Indefinite from September 29, 2009 |
| Iowa | | | | |
| Des Moines | Plumb, Van | Attorney | Suspended by default decision in expedited proceeding under § 10.82 (suspension of attorney license) | Indefinite from September 29, 2009 |
| Kentucky | | | | |
| Louisville | Radolovich, Ferdinand R. | Attorney | Suspended by default decision in expedited proceeding under § 10.82 (attorney disbarment) | Indefinite from September 29, 2009 |
| Louisiana | | | | |
| Kinder | Demoruelle, John E. | Attorney | Suspended by default decision in expedited proceeding under § 10.82 (suspension of attorney license) | Indefinite from September 29, 2009 |
| Oberlin | Willis, Michael S. | Attorney | Suspended by default decision in expedited proceeding under § 10.82 (revocation of attorney license) | Indefinite from September 29, 2009 |
| Maryland | | | | |
| Baltimore | Pawlak, Thomas F. | Attorney | Suspended by default decision in expedited proceeding under § 10.82 (suspension of attorney license) | Indefinite from September 29, 2009 |
| Massachusetts | | | | |
| Worcester | Holland, James K. | Attorney | Suspended by default decision in expedited proceeding under § 10.82 (attorney disbarment) | Indefinite from September 29, 2009 |

| City & State | Name | Professional Designation | Disciplinary Sanction | Effective Date(s) |
|-------------------------|--|---------------------------------|---|------------------------------------|
| New Jersey | | | | |
| Hoboken | Connolly, Matthew G. | Attorney | Suspended by default decision in expedited proceeding under § 10.82 (attorney disbarment) | Indefinite from September 29, 2009 |
| Franklin | Lynch, Jr., John G. | Attorney | Suspended by default decision in expedited proceeding under § 10.82 (attorney disbarment in New York) | Indefinite from September 29, 2009 |
| New York | | | | |
| Brooklyn | Dash, Jan A. | Attorney | Suspended by default decision in expedited proceeding under § 10.82 (suspension of attorney license) | Indefinite from September 29, 2009 |
| | Lynch, Jr., John G., See New Jersey | | | |
| | Quagliata, Salvatore, See Florida | | | |
| Huntington Station | Whittlesey, JoAnn C. | CPA | Disbarred by decision on appeal for violation of § 10.51 (willful failure to file several Federal tax returns) | Indefinite from July 18, 2009 |
| North Carolina | | | | |
| Charlotte | Daniel, Walter J. | CPA | Suspended by default decision in expedited proceeding under § 10.82 (revocation of CPA license) | Indefinite from September 29, 2009 |
| Pennsylvania | | | | |
| Williamsport | Hurwitz, Harold L. | Enrolled Agent | Disbarred by decision on appeal for violation of § 10.51 (willfully failing to timely file, or willfully failing to file personal Federal income tax returns) | Indefinite from April 21, 2009 |
| Tennessee | | | | |
| Memphis | Rafferty, Michael F. | Attorney | Disbarred by ALJ default decision for violation of § 10.51 (willful failure to file, and willful failure to timely file several Federal income tax returns) | Indefinite from June 17, 2009 |

| City & State | Name | Professional Designation | Disciplinary Sanction | Effective Date(s) |
|-------------------------|-------------|---------------------------------|--|------------------------------|
| Vermont | | | | |
| Colchester | Carp, Susan | Enrolled Agent | Suspended by default judgment for violation of § 10.51 (failure to promptly return tax records of former clients at their request) | Indefinite from July 6, 2009 |

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A

and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance

of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.

ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.

PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

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